No. 95-1425-ATX Title: Lucious Abrams, Jr., G. L. Avery, William Gary Chambers, Sr., and Karen Watson, Appellants
v.
Davida Johnson, et al.

Docketed:
March 7, 1996 Court: United States District Court for the Southern District of Georgia

Vide:
95-1460

Entry	Date	Proceedings and Orders
	Jan 26 1996	Application (A95-624) for a stay and/or injunction pending appeal, submitted to Justice Kennedy.
	Jan 29 1996	Application (A95-624) referred to the Court by Justice Kennedy.
	Feb 1 1996	Response to application (A95-624) filed by Zell Miller, Governor, et al.,.
	Feb 2 1996	Response to application (A95-624) filed by Davida Johnson.
	Feb 6 1996	Application (A95-624) denied by the Court.
	Mar 6 1996	Statement as to jurisdiction filed. (Response due April 6, 1996)
	Mar 28 1996	Waiver of right of appellee Thomas B. Murphy to respond filed.
	Apr 5 1996	Waiver of right of appellees John Lewis and Newt Gingrich to respond filed.
	Apr 10 1996	Motion of appellees Zell Miller, et al. to affirm filed. VIDED.
	Apr 12 1996	Motion of appellees Davida Johnson, et al. to affirm filed. VIDED.
	Apr 24 1996	DISTRIBUTED. May 10, 1996
	Apr 29 1996	Reply brief of appellants Lucious Abrams, et al. filed. VIDED.
	May 13 1996	REDISTRIBUTED. May 17, 1996
	May 20 1996	PROBABLE JURISDICTION NOTED. The cases are consolidated and a total of one hour is allotted for oral argument. SET FOR ARGUMENT December 9, 1996.
		**********
	May 31 1996	Application (A95-982) for a stay pending appeal, submitted to Justice Kennedy.
	Jun 4 1996	(A95-982) Application referred to the June 7, 1996 conference by Justice Kennedy
	Jun 6 1996	Brief of appellees in opposition to appellants' application for a stay pending appeal filed. VIDED.
	Jun 7 1996	(A95-982) Application denied by the Court
	Jun 19 1996	Order extending time to file brief of appellant on the merits until July 19, 1996.
	Jul 19 1996	Joint appendix filed. VIDED.
	Jul 19 1996	Brief of appellants Lucious Abrams, et al. filed.
	Jul 19 1996	Brief of appellant United States filed. VIDED.
	Jul 19 1996	Brief amicus curiae of Georgia Association of Black Elected Officials filed. VIDED.
	Aug 2 1996	Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae filed.

No. 95-1425-ATX

Entry	Date	Proceedings and Orders
	Aug 6 1996	Order extending time to file brief of appellee on the merits until September 13, 1996.
	Aug 20 1996	Record filed.
	Aug 21 1996	Record filed.
	Sep 12 1996	Brief of appellees Davida Johnson, et al. filed. VIDED.
	Sep 13 1996	Brief of appellees Zell Miller, Pierre Howard, and Lewis Massey filed. VIDED.
	Sep 20 1996	Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Sep 27 1996	Motion of the Acting Solicitor General for divided argument filed.
	Oct 9 1996	Motion of appellees for divided argument filed.
	Oct 15 1996	Motion of the Acting Solicitor General for divided argument GRANTED.
	Oct 16 1996	Reply brief of appellant United States filed. VIDED.
	Oct 16 1996	Reply brief of appellants Lucious Abrams, Jr., et al. filed.
	Oct 21 1996	Motion of appellees for divided argument GRANTED.
	Nov 8 1996	CIRCULATED.
	Dec 5 1996	Motion of appellees Davida Johnson, et al. to supplement the record filed.
	Dec 6 1996	Opposition of appellants Lucious Abrams Jr., et al. to motion of appellees Davida Johnson, et al. filed.
	Dec 6 1996	Opposition of United States to motion of appellees Davida Johnson, et al. filed.
	Dec 9 1996	ARGUED.
	Dec 9 1996	DISTRIBUTED. December 13, 1996 (Page 15)
	Dec 16 1996	Motion of appellees Davida Johnson, et al. to supplement the record DENIED.

(1)

Supreme Court, U.S.
FILED

No. _____ 951425 MAR - 6 1996

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

LUCIOUS ABRAMS, JR., REV. G. L. AVERY, WILLIAM GARY CHAMBERS, SR., and KAREN WATSON,

Appellants,

v.

DAVIDA JOHNSON, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia (Three Judge Court)

JURISDICTIONAL STATEMENT AND APPENDIX

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86 pp

QUESTIONS PRESENTED

1. Whether the district court, in drawing a remedial congressional redistricting plan, erred in disregarding the state's legislative policy choices and making changes that were not minimally necessary to cure the constitutional defects found in the existing plan?

2. Whether the court ordered plan, which fragmented the black population in two majority black districts and dispersed it throughout the state, thereby reducing the number of majority black districts from three to one, is retrogressive and/or dilutes black voting strength in violation of Sections 2 and 5 of the Voting Rights Act?

3. Whether the court erred in refusing to grant appellants an evidentiary hearing to provide them an opportunity to challenge the court's plan?

4. Whether the court ordered plan, which contains unnecessary population deviations, complies with the one person, one vote standard of Article I, Section 2 of the Constitution?

5. Whether the court erred in denying private intervention to defend the constitutionality of the Second Congressional District given the failure of the state defendants and the United States to appeal the court's finding that the Second District was unconstitutional?

PARTIES TO THE PROCEEDING

The appellants are Lucious Abrams, Jr., Rev. G. L. Avery, William Gary Chambers, Sr., and Karen Watson. The appellees are Davida Johnson, Pam Burke, Henry Zittrouer, George L. DeLoach, and George Seaton. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of State of Georgia. Max Cleland has been succeeded as Secretary of State by Lewis Massey. The United States of America was a defendant intervenor.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The December 13, 1995 opinion of the three judge court for the Southern District of Georgia implementing a court ordered redistricting plan for Georgia's congressional districts is unreported and appears in the appendix hereto, App. 1. The August 22, 1995 order of the district court denying intervention to defend the constitutionality of Georgia's Second Congressional District is unreported and appears in the appendix hereto, App. 42. The January 8, 1996 order of the district court denying appellants' motion for a hearing and reconsideration is unreported and appears in the appendix hereto, App. 44.

JURISDICTION

The opinion and order of the three judge court for the Southern District of Georgia was entered on December 13, 1995. Appellants filed their notice of appeal on January 11, 1996. *See* App. 46.

This appeal is being docketed in this Court within 60 days after the filing of the notice of appeal in the district court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the case are Article I, Section 2 of the Constitution of

the United States, and Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973c, the pertinent texts of which are set out in the appendix hereto, App. 49-52.

STATEMENT OF THE CASE

Appellants, who were defendant intervenors below ("Abrams intervenors"), are a group of black and white registered voters and residents of Georgia's Eleventh Congressional District. Appellees, plaintiffs below, are white residents of Georgia who challenged the state's 1990 congressional redistricting on constitutional grounds. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of State of Georgia. The United States of America was also a defendant intervenor.

In *Miller v. Johnson*, 115 S.Ct. 2475 (1995), this Court held that Georgia's Eleventh Congressional District was unconstitutional because the state, absent a compelling reason for doing so, had relied upon race as a predominant factor in redistricting in substantial disregard of customary and traditional districting practices. On remand, the three judge court allowed the plaintiffs to amend their complaint to challenge the constitutionality of the state's majority black Second Congressional District. In making its ruling the court refused to allow appellants to defend the constitutionality of the Second

District or to allow any further intervention by private parties.[1]

Following a trial the three judge court declared the Second District unconstitutional. App. 1-2.[2] The court provided the legislature an opportunity to adopt a congressional redistricting plan curing the constitutional defects in the Eleventh and Second Districts but on September 13, 1995 the defendants notified the district court that the legislature was deadlocked and had adjourned. App. 2.

The district court held a hearing at which it allowed the parties and various *amici* an opportunity to present proposed remedial plans. Prior to the hearing the court entered two orders. The first instructed the parties to submit "a plan that makes the least changes, in terms of line drawing, in Georgia's present congressional plan but

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[1] The court ruled that "[t]he Abrams intervenors will not participate . . . in the evidentiary proceedings on the matter of the constitutionality of the Second Congressional District of Georgia. It is our view that there is no need for intervenors in this litigation. The record is that the State of Georgia and its elected officials will defend the congressional districts that were enacted by the legislature to the full extent of the law. We have seen that and we expect that they will do that again and therefore we see no need to have intervenors." App. 42-3.

[2] None of the state defendants appealed the ruling that the Second Congressional District is unconstitutional, a position that the state defendants barely contested during the remand proceedings. As they themselves pointed out, "the State Defendants presented no witnesses and asked no questions of other witnesses at the liability hearing." Response of Defendants Miller, Howard and Cleland to 'Plaintiffs' Second Interim Petition for Fees and Expenses,' p. 5.

at the same time brings the Eleventh and the Second Congressional Districts . . . into compliance with the United States Constitution." Order, October 17, 1995, pp. 2-3. The second order directed the parties to "further submit a plan based on the first plan that Georgia submitted to the Department of Justice [following the 1990 census] for preclearance." Order, October 20, 1995, p. 1.

State defendants Miller, Howard, and Cleland refused to submit plans, advising the court that:

> the Defendants do not know what the Constitution now requires in terms of remedy. They do not have a view of what plan might satisfy the particular criteria set forth in the Court's orders. For that reason, they are unable to submit what the Court directs.

Submission of Defendants Miller, Cleland and Howard in Connection with the Issue of Remedy, p. 2. Appellants, the United States, and *amici* incumbent members of Congress (including Representatives John Lewis and Newt Gingrich) submitted least-change plans as directed by the court. App. 22 n.16.

The district court issued its plan on December 13, 1995 (Judge Edmondson dissenting). The court, in its own words, proceeded as if the state had adopted "no plans." App. 7. According to the court,

> Georgia's current congressional plan cannot form the basis for the remedy we now construct because it does not represent the goals of Georgia's historic policies nor the state legislature's true intent.

App. 4. *Also see* App. 5 ("we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals"), App. 6 ("we are unable to use Georgia's current plan as the basis for a remedy"), App. 7 ("the Court's task is akin to those cases in which states had no plans").

The district court was of the view that no deference was due the existing plan because it was the product of the "Department of Justice's [i]nterference." App. 4. The court said that "DOJ basically used the preclearance process to force Georgia to adopt the ACLU redistricting plan and, in the process, subvert its own legislative preferences to those of the DOJ." App. 5. Accordingly, the court was "not bound by *Upham* to make only minimal changes to the current plan in fashioning a remedy." App. 5-6. Adopting a remedy that would be "minimally disruptive to Georgia's current plan was not an option." App. 29. Any remedy "would necessarily have resulted in drastic changes." App. 6.

The court's plan eliminated two of the three majority black districts in the existing plan, reducing the black voting age population (VAP) in the Second District from 52.3% to 35.1%, and in the Eleventh from 60.4% to 10.8%. *Johnson v. Miller*, 864 F.Supp. 1354, 1366 n.12 (S.D.Ga. 1994), *aff'd sub nom. Miller v. Johnson*, *supra*; App. 39.[3] The court's plan also represented a "drastic change[ ]" from the first plan enacted by the general assembly prior to any involvement by the Department of Justice, which

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[3] The black VAP in the remaining majority black district, the Fifth, was increased from 53% to 57.2%. App. 16.

contained two majority black districts, the Fifth and the Eleventh. Under the state's original plan, the Fifth District was located in the metropolitan Atlanta area, and the Eleventh ran from DeKalb County to the southeast. *Miller v. Johnson, supra,* 115 S.Ct. at 2483.

The district court refused to draw a second majority black district because in its view "Georgia's minority population is not geographically compact." App. 22. The court conceded, however, that:

> If Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so.

App. 22 n.16.

The court did hold that "Section 2 of the VRA required the Court to maintain the Fifth District as a majority-minority district." App. 18. Because of racial bloc voting, a district containing "the percentage of black registered voters as close to fifty-five percent as possible was necessary . . . to avoid dilution of the Fifth District minorities' rights." App. 26.

The plan adopted by the court thus preserves the Fifth District as a majority-minority district. At the same time, however, the black population in the Second and Eleventh Districts was dispersed throughout the state into other districts. The black VAP was increased in the First District from 20.3% to 27.7%, in the Third from 16.3% to 22.5%, in the Fourth from 10.8% to 32%, in the Eighth from 18.4% to 28.3%, and in the Tenth from 16.5%

to 34.5%. *Miller v. Johnson,* No. 94-631 (S.Ct.), Joint Appendix, p. 20; App. 39.

Furthermore, the court relocated the Eleventh District and put it "in the Northeast Atlanta corridor" where it would have an "urban/suburban flavor," App. 13-4, and be "a 'radius' district reaching from suburban Atlanta to the state line." App. 14. The justification for the relocation was that this was an area "where future growth is anticipated." App. 13. The Eleventh District was also configured around "Interstate Eighty-Five as a very real connecting cable." App. 14.

The court substantially reconfigured the Third, Eighth, and Tenth Districts, as well. Under the prior plan the Third District was located essentially in the center of the state. *Miller v. Johnson,* No. 94-631 (S.Ct.), Joint Appendix, p. 51. The court's plan moved it to the western edge of the state. App. 41. The new Tenth District was drawn south to fill the void left by moving the Eleventh to the northeast Atlanta corridor. *Id.* Under the court's plan the Eighth District runs from the Florida line north to metropolitan Bibb County and thence further north to the suburbs of Atlanta, including in a single district the metropolitan hub counties of Lamar, Upson, and Monroe with the rural, south Georgia counties of Echols, Clinch, and Charlton. *Id.*

The court's plan moved a total of 2,020,820 people – 31.2% of the state's population – into new congressional districts. Abrams Intervenors' Motion for Hearing and for Reconsideration, Declaration of Linda Meggers. By contrast, one of appellants' proposed least-change plans moved only 784,531 people into new districts, or 12.1% of

the population of the state. Abrams Intervenors' Memorandum in Response to Submission of Additional Demographic Evidence by Defendants Miller, Howard & Cleland, November 27, 1995 letter from Linda Meggers.

In devising its plan, the court explicitly "subordinated" protection of incumbents "to other considerations." App. 18. It moved the incumbent in the Eleventh District to the Fourth District, the incumbent in the Second District to the Third District, and the incumbent in the Eighth District to the Second District. The effect of these changes is to create potential contests between incumbents in Districts Three and Four. App. 18-9. Two of the three dislocated incumbents were black, and only these two were placed in new districts with other incumbents.

Finally, the court's plan contained a total deviation among districts of 0.35%, App. 39, although the Department of Justice prepared a proposed remedial plan with a deviation of only 0.19%. United States' Response to Plaintiffs' Plans Remedy 4X and 4X-R. The district court justified the deviation in its plan by deferring to the state's preference "for not splitting counties outside of the metropolitan area," App. 8, and because it wished to maintain "communities of interest." App. 11. In addition, the court noted that "no precise count of a district's population can be made using 1990 data." App. 12.

Judge Edmondson did not file a written dissenting opinion. During the August 22, 1995 hearing, however, he indicated in comments from the bench that the duty of a federal court was "in each instance to make the least amount of changes, the fewest amounts of changes, and

the least dramatic changes, possible" to bring a plan into compliance with the Constitution. Transcript of Hearing, p. 29. In his opinion, the court did not have a license to "just redraw Georgia." *Id.* at 36.

On January 8, 1996 the court denied appellants' motion for reconsideration and an evidentiary hearing to challenge the court ordered plan. App. 44. Appellants filed their notice of appeal on January 11, 1996. App. 46.

THE QUESTIONS ARE SUBSTANTIAL

This appeal raises substantial questions involving federalism and respect for state policy making, the appropriate limits of federal judicial power, and the standards applicable to court ordered redistricting in the wake of *Miller v. Johnson*. The questions are of exceptional importance since they have the potential for affecting redistricting plans not simply for Congress, but for numerous state and local jurisdictions throughout the country that have come under increasing attack in *Miller* type challenges.[4]

[4] Both before and after *Miller* court ordered congressional and/or legislative plans have been implemented in a number of jurisdictions, *e.g.*, South Carolina (Burton v. Sheheen, 793 F.Supp. 1329 (D.S.C. 1992)), *vac. and remanded sub nom.* SRAC v. Theodore, 113 S.Ct. 2954 (1993), California (DeWitt v. Wilson, 115 S.Ct. 2637 (1995), *affirming* 856 F.Supp. 1409 (E.D.Cal. 1994)), Florida (De Grandy v. Wetherell, 794 F.Supp. 1076 (N.D.Fla. 1992)), Louisiana (United States v. Hays, 115 S.Ct. 2431 (1995)), Alabama (Wesch v. Hunt, 785 F.Supp. 1491 (S.D.Ala. 1992), *aff'd sub nom.* Camp v. Wesch, 112 S.Ct. 1926 (1992), Figures v. Hunt, 113 S.Ct. 1233 (1993)). In Georgia, the plaintiffs in *Miller* have moved to amend their complaint to challenge 28 of the state's 54

The lower court read *Miller* as giving it a license to redraw the congressional map of Georgia and to substitute its own districting preferences for those of the state, and specifically disavowed any obligation to preserve insofar as possible elements of the first plan enacted by the legislature following the 1990 census, including the location of the Eleventh District and the creation of two majority black districts. Unless the decision below is reversed, *Miller* will be interpreted as authorization for federal courts to displace state officials and state policies in the redistricting process. The decision will also lead to the destruction of majority black districts at every level of government. Inevitably, the number of blacks holding public office will substantially decline. These consequences, which could not have been intended by this Court, would be tragic for blacks and for all Americans. They would not only undermine the Voting Rights Act but the very concept of democratically elected government.

I. The "Drastic Changes" Approach of the District Court Is Contrary to the Decisions of this Court

The district court redrew the entire congressional map for the state of Georgia, proceeding by its own

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majority black house and senate districts and have asked the district court to implement court ordered plans for the next elections. Johnson v. Miller, Civ. No. 194-008 (S.D.Ga.), Plaintiff's Motion to Reopen case, Supplement Complaint and to Add Parties. Similar *Miller* type challenges have also been filed against state house and senate redistricting in South Carolina. Smith v. Beasley, Civ. No. 3-95-3235 (D.S.C.); Able v. Wilkins, Civ. No. 3-96-0003 (D.S.C.).

admission as if the state had adopted "no plans," App. 7, and making admittedly "drastic changes." App. 6. In doing so, the district court contravened the precedents and directives of this Court that federal court ordered remedies be limited to those minimally necessary to cure any constitutional defect.

A. Standards Applicable to Court Ordered Plans

Court ordered redistricting plans are held to higher and different standards than legislatively adopted plans. While an elected legislature is situated to identify and reconcile traditional state policies, "[t]he federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Connor v. Finch*, 431 U.S. 407, 415 (1977). Because of the intrusive nature of court ordered redistricting and the need for circumspection, *Chapman v. Meier*, 420 U.S. 1, 26 (1975), court-ordered plans must be " 'free from any taint of arbitrariness or discrimination.' " *Connor v. Finch, supra*, 431 U.S. at 415, *quoting Roman v. Sincock*, 377 U.S. 695, 710 (1964).[5]

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[5] One of the reasons federal courts should act circumspectly and adhere to state legislative policy choices where possible is to avoid even the appearance of partisan or other bias. The "drastic changes" approach of the district court in this case has, unfortunately, given rise to speculation that the plan was driven by partisan bias. *See* Jeff Dickerson, "At Christmas, black party loyalty doesn't pay off," The Atlanta Journal, December 20, 1995 ("The judges – both appointed by Democrats, coincidentally – did away with two of the state's three majority black districts, balkanizing the black vote in a way that benefits white Democrats"); Kevin Merida, "ACLU to

The powers of the federal courts must be adequate to the task of fashioning remedies for constitutional violations, but those powers "are not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). Any remedy must be related to "the condition alleged to offend the Constitution." *Milliken v. Bradley*, 418 U.S. 717, 738 (1974). *See Missouri v. Jenkins*, 115 S.Ct. 2038, 2058 (1995) (federal courts do not have "a blank check to impose unlimited remedies upon a constitutional violator") (O'Connor, J., concurring).

A court "should follow the policies and preferences of the State, expressed in statutory and constitutional provisions or in reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *White v. Weiser*, 412 U.S. 783, 795 (1973). The decisions and judgments of a state legislature "in pursuit of what are deemed important state interests . . . should

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Appeal Decision Remapping Ga. Districts," Washington Post, December 15, 1995 (quoting the chair of the Georgia Democratic Party that "[t]he changes that were made favored us in virtually every district"); Mike Christensen, "Reactions to the plan are all over the map," Atlanta Journal Constitution, December 14, 1995 (quoting Rep. John Linder that " '[i]t appears that the two Democratic judges tried to draw a map for white Democrats . . . [w]hat [Georgia House Speaker] Tom Murphy couldn't get done on the floor of the Legislature he got the judges to do for him' "). Public trust and confidence in the impartiality of the judiciary cannot but be undermined by the unnecessary breadth of the redistricting by the district court in this case. *Cf.* Miller v. Johnson, *supra*, 115 S.Ct. at 2497 (O'Connor, J., concurring) ("[a]pplication of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts").

not be unnecessarily put aside in the course of fashioning relief." *Id.* at 796.

These principles are best exemplified by *Upham v. Seamon*, 456 U.S. 37 (1982). There, the Attorney General objected under Section 5 to two congressional districts in Texas. The district court proceeded to resolve the objections to the districts but in addition devised its own plan for four other districts as to which there had been no objection. 456 U.S. at 40. In vacating the decision, the Court noted that "[t]he only limits on judicial deference to state apportionment policy . . . were the substantive constitutional and statutory standards to which such plans are subject." 456 U.S. at 42. In fashioning a court ordered remedy, therefore, a district court may not reject state policy more than is necessary "to meet the specific constitutional violations involved." *Id.* In remanding the case for further proceedings, the Court concluded that:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of 'reconciling the requirements of the Constitution with the goals of state policy.' *Connor v. Finch, supra*, at 414, 97 S.Ct. at 1833. An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the Dallas County reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly

was not required, to disregard the political program of the Texas State Legislature.

456 U.S. at 43.

In light of *Upham*, the district court's remedial powers in this case were limited to curing any constitutional defects in the Second and Eleventh Districts. The court's "drastic changes" approach cannot be squared with *Upham* and the other redistricting decisions of this Court.

B. Ignoring the State's Interest in Two Majority Black Districts

The court's plan eliminated two of the three majority black districts in the existing plan, despite the fact that the legislature intended to (and in fact did) create a second majority black district after the 1990 census, which gave the state an additional seat in Congress. App. 22.[6] The court's justification for refusing to draw a second majority black district was that "Georgia's minority population is not geographically compact." App. 22. The

[6] In submitting its first plan, the state reiterated "its stated goals of meeting the one person-one vote standard and not diluting minority voting strength. . . . This was achieved by creating a second majority black Congressional district as the additional Congressional seat provided to Georgia by the 1990 decennial census. . . . Therefore, the State of Georgia is pleased to present a Congressional plan which has increased the number of majority black Congressional districts from one to two." Johnson v. Miller, Civ. No. 194-008 (S.D.Ga.), Plaintiffs' Exhibit 1.

legislature, however, in enacting its first plan was obviously of the view that the black population *was* sufficiently compact to constitute a majority in a second congressional district.[7]

This Court held in *Miller* that the legislature's *third* post-1990 plan – adopted after the Attorney General refused to preclear the first two plans – was unconstitutional, but it never held or suggested that the first plan was unconstitutional. Insofar as the Voting Rights Act is concerned, the Court acknowledged that the first plan was " 'ameliorative' and could not have violated § 5's non-retrogression principle." *Miller v. Johnson, supra,* 115 S.Ct. at 2492.

The first plan was based upon the state's traditional districting principles and would not therefore trigger strict scrutiny under *Miller v. Johnson*. *See* 115 S.Ct. at 2497 ("[t]o invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices") (O'Connor, J., concurring). None of the state defendants contended below that the first plan was unconstitutional or that it subordinated the state's traditional redistricting principles to race.

[7] Proposed remedial plans submitted by the parties and *amici* also showed that a compact second majority black district can in fact be drawn in Georgia. In any event, "compactness" was not one of the state's redistricting guidelines or principles. *Miller*, 115 S.Ct. at 2483.

The contemporaneous record, always the best evidence of legislative intent,[8] shows that the defendants believed the first plan complied with constitutional and Voting Rights Act standards, as well as the state's traditional redistricting principles. According to defendant Murphy, the first plan the state drew "suited me." *Johnson v. Miller*, Civ. No. 194-008 (S.D.Ga.), Testimony of Thomas Murphy, Transcript Volume II, p. 80 ("T. Vol."). He did not regard it as a "gerrymander," *id.*, because "the first reapportionment we went on didn't have any irregular features." T.Vol. II, p. 83. Bob Hanner, the chair of the house reapportionment committee, testified that in drawing the first plan the legislature tried to avoid minority vote dilution and to maintain "communities of interest," *i.e.*, "to keep the interest of the coastal interest intact, the agricultural interest intact, the carpet interest intact, and the mountainous interest intact." Testimony of Bob Hanner, T. Vol. III, 107.

It was error for the district court to ignore the policy judgments of the legislature. Under *Upham* the court was not free to impose its own belief that, in the court's words, "Georgians deserve a better fate" than to have two majority black congressional districts. App. 22. That is especially true when in doing so, as noted *infra*, the court diluted the voting strength of a "community

[8] *See* Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 267-68 (1977), and Edwards v. Aguillard, 482 U.S. 578, 595-96 n.19 (1987) (after-the-fact statements are of "little relevance in determining the intent of the legislature").

defined by actual shared interests." *Miller v. Johnson*, *supra*, 115 S.Ct. at 2475.

C. Relocating District Cores and Dislocating Incumbents

Disregarding the state's traditional and explicitly articulated interest of "preserving the core of existing districts," *Miller v. Johnson*, *supra*, 115 S.Ct. at 2483, the court completely relocated the Eleventh District and put it "in the Northeast Atlanta corridor" where it would be a " 'radius' District" and would have an "urban/suburban flavor." App. 14. The court paid lip service to maintaining "district cores" in its frequent references to the state's 1972 and 1982 plans. App. 15, 17-8. Not only were these plans malapportioned ten seat plans but both were superseded by the eleven seat plan first enacted by the general assembly following the 1990 census. The best and most reliable evidence of "district cores" was the first enacted plan, a plan which the court by its own admission ignored when it redrew the Eleventh District.

The district court also drastically reconfigured the Third and Tenth Districts. In the process, it created an Eighth District that, to use the words of this Court in invalidating the old Eleventh District, included areas that are "miles apart in distance and worlds apart in culture." *Miller v. Johnson*, *supra*, 115 S.Ct. at 2484. The Eighth is the kind of "geographic monstrosity" criticized by the majority in *Miller*. *Id.* A principal difference in the new Eighth and the old Eleventh is that the former is majority (72%) white, while the later was majority (60%) black, indicating that the district court employed the kind of dual

standard in redistricting disavowed by this Court in *Miller*. *See* 115 S.Ct. at 2497 ("certainly the standard [adopted in *Miller*] does not treat efforts to create majority-minority districts less favorably than similar efforts on behalf of other groups") (O'Connor, J., concurring).

The court's plan moved incumbents and pitted them against each other in a number of districts, again in disregard for the state's traditional and stated policy of "avoiding contests between incumbents." *Miller v. Johnson*, *supra*, 115 S.Ct. at 2483. Two of the three dislocated incumbents were black, and only these two were placed in new districts with other incumbents.

Finally, the court's plan shifted nearly a third of the state's population into new districts. Abrams Intervenors' Motion for Hearing and for Reconsideration, Declaration of Linda Meggers. Least-change plans proposed by the parties and *amici* showed that it was possible to draw far less disruptive plans that at the same time cured the constitutional defects in the prior plan. Abrams Intervenors' Memorandum in Response to Submission of Additional Demographic Evidence by Defendants Miller, Howard & Cleland, November 27, 1995 letter from Linda Meggers.

D. The District Court's Attempt to Distinguish *Upham*

The district court attempted to distinguish *Upham* by claiming that the state's third plan "does not represent the goals of Georgia's historic policies nor the state legislature's true intent." App. 4. Assuming that to be true, the "policies" and "true intent" of the state *were* represented

in the first plan enacted by the legislature *prior* to any involvement by the Department of Justice. That plan necessarily reflected the legislature's, not DOJ's, reapportionment policies and goals.

The district court further defended its "drastic changes" approach on the grounds that it was forced "to divine" or speculate about what "the legislature might have done had it not been for the DOJ's subversion of the redistricting process." App. 13. But the court did not have to resort to divination or speculation; in enacting the first plan, we know what the legislature *actually did*. Unless the state's legislative policies were unconstitutional, the district court was not free simply to ignore them.

The district court's plan is not the kind of minimally disruptive plan that the court was obligated to adopt. *Upham v. Seamon*, *supra*, 456 U.S. at 43. Probable jurisdiction should be noted to correct the district court's egregious departure from the precedents of this court.

II. The Plan Is Retrogressive in Violation of *Beer* and Section 5

The court's plan, which contains only one majority black district, is plainly retrogressive within the meaning of *Beer v. United States*, 425 U.S. 130, 141 (1976) (changes in voting that diminish minority voting rights are prohibited by the "effect" language of Section 5). The plan reduced the number of majority black districts from the levels in the third legislative plan (which had three of eleven) and the first legislative plan (which had two of eleven), to only one of eleven in a state that is 27% black.

The court took the position that its plan was not retrogressive "when compared to the 1982 plan." App. 27. This comparison, however, overlooks the fact that the 1982 plan contained ten districts while the 1992 plan contains eleven. To use the well worn phrase, comparing the two plans is like comparing apples and oranges. The ten seat 1982 plan by definition cannot serve as "a reasonable benchmark by which to evaluate" the court's eleven seat plan. *Holder v. Hall*, 114 S.Ct. 2581, 2586 (1994).[9]

More appropriate benchmarks for determining retrogression are either the state's initial eleven seat plan containing two majority black districts, or the state's clearly articulated policy and goal of creating two majority black districts. Using either of these benchmarks, the court ordered plan would violate the retrogression standard of *Beer*.[10]

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[9] Even assuming the 1982 plan were a proper benchmark, the court ordered plan would still be retrogressive. Under the 1980 plan one (10%) of the ten districts was majority black. Under the court's plan only one (9%) of the eleven districts is majority black. Blacks would be worse off within the meaning of *Beer* under a plan in which they were a majority in one of eleven districts than a plan in which they were a majority in one of ten districts.

[10] It is unnecessary to reach the issue whether the third plan enacted by the general assembly cured of constitutional defects could serve as a benchmark since the court ordered plan would be retrogressive under a plan containing only two majority black districts.

III. The Plan Violates Section 2

While it refused to grant appellants a hearing on the issue, the court's plan, which creates only one majority black district, violates Section 2 of the Voting Rights Act. The record shows that blacks in Georgia are sufficiently compact geographically that two majority black districts can be drawn,[11] that blacks are politically cohesive, and that on a statewide basis whites vote as a bloc usually to defeat the candidates preferred by blacks.[12] *Thornburg v. Gingles*, 478 U.S. 30 (1986). In addition, the totality of the circumstances, including evidence of past discrimination and its continuing effects, strongly supports a finding that the court's plan would result in discrimination in violation of Section 2. *Johnson v. De Grandy*, 114 S.Ct. 2647, 2660 (1994).

The court's plan is a classic example of fragmenting concentrations of minority population with the result that

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[11] Although the district court found otherwise, that finding is both clearly erroneous and contrary to the districting policies adopted by the state. Linda Meggers, the state's chief demographer, testified that it was possible to create a second majority black district without splitting rural counties, and that she had in fact done so. Johnson v. Miller, Civ. No. 194-008 (S.D.Ga.), Transcript of Hearing, October 30, 1995, p. 445. In addition, the house passed a plan during the abortive special session following remand creating a second majority black district which Ms. Meggers conceded was "in terms of its size . . . within the range of districts that the state has created in the past." *Id.* at 444.

[12] As the district court found, based on a "statewide" analysis by the defendants' expert, App. 26 n. 18, a district containing "black registered voters as close to fifty-five percent as possible was necessary . . . to avoid dilution." App. 26.

blacks are a majority in fewer districts. *See Connor v. Finch, supra,* 431 U.S. at 423 (criticizing redistricting in Mississippi which fragmented areas "where much of the Negro population is concentrated"). *Also see* Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* 51 (1990) (identifying "the fragmentation of black population concentrations to prevent blacks from having an effective voting majority in any district" as one of the techniques of racial gerrymandering in favor of white voters). The black population in the Second and Eleventh Districts was dispersed into Districts One, Three, Four, Eight, and Ten. As a consequence, blacks are between 23% to 35% in six districts, but a majority in only one.

The district court candidly acknowledged "a significant drop in the probability of a black candidate being elected as the black percentage of registered voters declines to fifty percent." App. 26. For that reason, in Georgia a district containing approximately 55% of black registered voters was necessary "to avoid dilution" of minority voting strength. *Id.* Unfortunately, given its own analysis and definition of minority vote dilution, the court's plan fails to meet Section 2 standards.

A. The Court was Required to Hold a Section 2 Hearing

In *Burton v. Sheheen,* 793 F.Supp. 1329 (D.S.C. 1992), the district court implemented court ordered congressional and legislative redistricting plans but refused to conduct a Section 2 evidentiary hearing to provide the parties an opportunity to challenge the plans. According

to the district court, "the evidentiary burden presented by a § 2 challenge to each proposed plan in this case would have been staggering and would likely be ongoing." 793 F.Supp. at 1353. On appeal this Court vacated and remanded *sub nom. SRAC v. Theodore,* 113 S.Ct. 2954 (1993), "for further consideration in light of the position presented by the Solicitor General in his Brief for the United States filed May 7, 1993."

The Solicitor General's position was that:

> the court was required to afford all parties the opportunity to present specific Section 2 objections before imposing those plans for use in future elections. The court should have received and reviewed evidence concerning each challenged district, considered that evidence in light of all of the relevant factors enumerated in *Gingles,* and included in its opinion specific, reviewable findings of fact and conclusions of law with respect to each such district's compliance with federal law. Such a process would be fair to the parties, present the district court with a judicially manageable task, take advantage of the district court's familiarity with the specific facts and arguments in the case, and properly assist this Court in its appellate review.

SRAC v. Theodore, No. 92-155 (S.Ct.), Brief for the United States as Amicus Curiae, pp. 18-9.

In this case, the district court held a hearing to allow the parties an opportunity to present remedial plans of their own, but it never held a hearing to allow the parties an opportunity to present evidence and comment on whether or not the court's plan complied with the Constitution and the Voting Rights Act. In light of *SRAC v.*

Theodore, it was error for the district court to deny appellants an evidentiary hearing on the court's plan.

IV. The Plan Does not Comply with One Person, One Vote

Because congressional redistricting is governed by Article I, Section 2 of the Constitution, "absolute population equality [is] the paramount objective." *Karcher v. Daggett*, 462 U.S. 725, 732 (1983). Federal courts, moreover, are held to even stricter standards in redistricting than legislatures. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978).

The total deviation among districts in the district court's plan is 0.35%. App. 39. A plan with a lower overall deviation (0.19%) was prepared by the Department of Justice. United States' Response to Plaintiffs' Plans Remedy 4X and 4X-R. Given modern computer technology, there is no reason why there should be any deviation in a court ordered congressional redistricting plan. Other district courts have had no difficulty in drafting or approving plans with zero deviations. *See Hastert v. State Board of Elections*, 777 F.Supp. 634, 644 (N.D.Ill. 1991) (adopting a plan containing "mathematically perfect population equality"), and *Burton v. Sheheen, supra*, 793 F.Supp. at 1367-68 (court ordered plan containing zero deviation).

The district court did not contend that it was impossible to construct a plan with a lower deviation. Instead, it attempted to justify the deviation by deferring to the state's alleged preference for not splitting counties outside of the metropolitan area, App. 8, because it wished

to maintain "communities of interest," App. 10, and because the 1990 census was stale. App. 12. *Karcher v. Daggett, supra*, 462 U.S. at 738, rejected a similar attempt to "explain population deviations on the basis of flaws in census data." *Karcher* also rejected the notion that Article I, Section 2 tolerated *de minimis* deviations. 462 U.S. at 734 ("[w]e thus reaffirm that there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2, without justification").

Karcher held that to justify deviations based upon asserted state interests such as preserving political boundaries, a state would have to do more than rely on "general assertions." 462 U.S. at 741. The general assertions made by the district court in this case do not begin to meet the standard of specificity demanded by *Karcher* to excuse compliance with the constitutional standard of absolute population equality.

CONCLUSION

For the above reasons, this Court should summarily reverse or in the alternative note probable jurisdiction of this appeal.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DAVIDA JOHNSON; PAM BURKE; HENRY ZITTROUER; GEORGE L. DELOACH; and GEORGE SEATON,	)	CV 194-008
Plaintiffs,	)	
v.	)	
ZELL MILLER, in his official capacity as Governor of the State of Georgia; et. al.,	)	
Defendants.	)	

Before EDMONDSON, Circuit Judge; EDENFIELD, Chief Judge; and BOWEN, District Judge.

ORDER

(Filed Dec. 13, 1995)

This Court's September 12, 1994, Order declared Georgia's Eleventh Congressional District unconstitutional. *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994) ("*Johnson* I"). The Supreme Court affirmed our decision in *Miller v. Johnson*, ___ U.S. ___, 132 L.Ed.2d 762 (1995) ("*Johnson* II"). In accordance with the Supreme Court's affirmance, we held a hearing on August 22, 1995, to determine the best means of resolving the issue of remedy. Plaintiffs moved for leave to add residents of Georgia's Second Congressional District in a constitutional challenge thereto. The Court granted that motion, held a

trial, and declared the Second District unconstitutional. *Johnson v. Miller*, ___ F. Supp. ___ (S.D. Ga. 1995) ("*Johnson* III").[1]

As to the remedy, we deferred to Georgia's legislature, allowing it an opportunity to draw a new congressional map in accordance with the Supreme Court's holding and this Court's prior findings. *Growe v. Emison*, ___ U.S. ___, 122 L.Ed.2d 388 (1993). Time obviously was of the essence in light of the rapidly approaching 1996 Congressional elections and the more imminent 1996 congressional campaigns. However, the legislature notified the Court on September 13, 1995, that it was unable to redraw the map and had adjourned, effectively leaving the task to us. *See* "Notice of Def. Murphy with Respect to Legislative Adjournment." We are therefore forced to redraw Georgia's congressional districting plan.

I. Scope of Remedy

In fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan. *Upham v. Seamon*, 456 U.S. 37 (1982). The rationale for such a "minimum change" remedy is the recognition that redistricting is an inherently political task for which federal courts are ill-suited. *Id.* at 41-42. A minimum change plan acts as a surrogate

[1] All page references to *Johnson* III are to the manuscript Order on file with the clerk's office. All references to transcripts from the Eleventh District trial will be "Eleventh Trl. Trans.," and reference to the Second District trial will be "Second Trl. Trans."

for the intent of the state's legislative body. *See Id.* at 43 (district court must reconcile Constitutional requirements with goals of state policy); *White v. Weiser*, 412 U.S. 783, 795 (1973) ("district court should . . . honor state policies in the context of congressional reapportionment").

In *Upham*, the Texas legislature had passed a congressional districting plan and submitted it to the U.S. Department of Justice ("DOJ") for preclearance. While the plan was with the DOJ, a case was filed in district court challenging the plan's constitutionality under the Voting Rights Act ("VRA"). The U.S. Attorney General also objected to the plan, specifically objecting to two of the plan's twenty seven districts. The three judge panel determined that the two districts were unconstitutional, and devised a plan of its own. The court's plan redrew the two objectionable districts and two adjoining districts. However, in doing so, the Court substituted its own judgment for the Texas legislature's and redrew districts in Dallas County in addition to the two objectionable south Texas districts. Reasoning that the legislatively-drawn districts would have failed retrogression analysis, the court redrew the Dallas County districts under the stricter standard applicable to courts. Thus, the court ignored the legislature's preferences.

Reversing, the Supreme Court held that the district court erred in redrawing the Dallas County districts absent an objection to those by the attorney general or a specific finding that they were unconstitutional. The Court stated that a "district court's modifications of a state plan [should be] limited to those necessary to cure any constitutional or statutory defect." *Upham*, 456 U.S. at 43. And, " '[i]n fashioning a reapportionment plan or in

choosing among plans, a district court should not preempt the legislative task nor intrude upon state policy any more than necessary.' " *Id.* at 42 (quoting *Weiser*, 412 U.S. at 794-95). The Court had no objection to the district court's correction of the two objectionable districts or the two adjoining districts that were necessarily impacted as a result thereof.

At first glance it appears that, in remedying Georgia's constitutionally infirm congressional districting plan, we are faced with the same task as the *Upham* court, which would entail making only those changes necessary to bring the current plan into constitutional compliance. However, this Court's remedial task differs from that of the *Upham* court's because Georgia's current plan was not the product of Georgia's legislative will. Rather, the process producing Georgia's current plan was tainted by unconstitutional DOJ interference. *See Johnson* I, 864 F. Supp. at 1367-68. By virtue of its unconstitutional origin, Georgia's current congressional plan cannot form the basis for the remedy we now construct because it does not represent the goals of Georgia's historic policies nor the state legislature's true intent.

A. Department of Justice's Interference

Central to this Court's finding that the Second and Eleventh Districts are unconstitutional was the DOJ's level of involvement in the creation of the current plan. The DOJ used informants inside the legislature to keep tabs on the legislature's progress. *Id.* at 1367. It worked closely with the ACLU to help the ACLU achieve its objective of three majority-minority districts in Georgia.

Id. at 1362-63 (finding, among other things, that the "DOJ was more accessible and amenable to the opinions of the ACLU than to those of the Attorney General of the State of Georgia"). The DOJ rejected Georgia's first two plans even though they clearly did not violate Section 5 of the Voting Rights Act. *Johnson* II, 132 L.Ed.2d at 784. The DOJ basically used the preclearance process to force Georgia to adopt the ACLU redistricting plan and, in the process, subvert its own legislative preferences to those of the DOJ. The product of the process, the unconstitutional plan, more closely reflects the DOJ's and ACLU's intentions than the Georgia General Assembly's. *Johnson* I, 864 F. Supp. at 1367 (finding the precleared plan "bore all the signs of DOJ's involvement"). Using the current plan as a basis for the remedy would, in effect, validate the DOJ's constitutionally objectionable actions. Thus, we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals. *See Johnson* II, 132 L.Ed.2d at 782 ("Georgia's . . . redistricting *plan* cannot be upheld unless it satisfies strict scrutiny," which the Court found it did not) (emphasis added); *Johnson* I, 864 F. Supp. at 1393 (finding "[i]n sum, the current districting *plan* is not reasonably necessary to comply with Sections 2 or 5 of the VRA. Since no compelling state interest other than VRA compliance is evident, the *plan* fails strict scrutiny under the Fourteenth Amendment") (emphasis added).

Because the current plan does not represent the Georgia legislature's intent, we are not bound by *Upham* to

make only minimal changes to the current plan in fashioning a remedy.[2] Finally, since two of Georgia's districts are unconstitutional, are on opposite sides of the state, and contain all or parts of nearly a third of Georgia's counties, any remedy even minimally disruptive to the current plan would necessarily have resulted in drastic changes.[3] Considering the objective that each congressional district should ideally contain 588,929 persons, it is a virtual impossibility to change less than we have.

B. Remedy

Because we are unable to use Georgia's current plan as the basis for a remedy, we were compelled to devise our own plan. The remedy we devised and now order into effect is attached to this order as Appendix A, with the verbal census block description attached as Appendix B. The plan contains one majority-minority district, has an overall population deviation of .35%, and an average deviation of .11%. The plan and how we devised it we further explain below.

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[2] This does not mean that we ignored the current plan altogether, only that our consideration of it was tempered by its origins.

[3] The DOJ's demand for three majority-minority districts resulted in land bridges, splitting numerous counties outside of metropolitan Atlanta predominantly for racial reasons, and splitting 70 voting precincts for the same reasons. *Johnson* I, at 1367; *Johnson* III, at 6.

II. Remedial Factors

Since the Court is not limited to Georgia's current unconstitutional plan, the Court's task is akin to those cases in which states had no plans. Thus, when devising the remedy, the Court was bound by the stricter guidelines applicable to court plans. These guidelines include the one person-one vote requirement and the state's traditional districting principles.

A. One Person, One Vote

The Equal Protection clause of the Constitution requires "no less than substantially equal . . . representation for all citizens, of all places as well as of all races." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). In adhering to this principle of one person-one vote, the Supreme Court has allowed legislatures only the narrowest of margins in population deviations when drawing congressional districts. *See Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (requiring congressional districts to be "as nearly as is practicable" to one person-one vote); *Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983) ("absolute population equality [is] the paramount objective" in congressional apportionment). Since federal courts are held to stricter standards than legislatures in redistricting, *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978), we were particularly constrained to create a remedy with the lowest population deviation practicable.

Our remedy's population deviation is not perfect. The Supreme Court's mandate that courts follow a state's

historical legislative districting principles sometimes conflicts with the one person-one vote requirement. Where such tensions existed, we sought to defer to one person-one vote without decimating the historical character of Georgia's congressional plans. The resultant remedy contains a lower deviation than the current Georgia plan, the 1982 plan, and any other plan presented to the Court which was not otherwise constitutionally defective.[4] Nevertheless, there is some deviation resulting from our adherence to Georgia's traditional districting principles and unique factors, some of which we pause to reconcile here, the remainder of which we discuss in Part II(B) *infra*.

Georgia's strong historical preference for not splitting counties outside of the metropolitan Atlanta area, as well as other unique factors, account for some of our plan's deviation. *See Connor v. Finch*, 431 U.S. 407, 419-20 (1977) (in court plan reapportioning state legislature, court is required to enunciate historically significant state policy or unique features that result in deviation from ideal district size); *Weiser*, 412 U.S. at 795 (1973) ("District Court should . . . honor state policies in the context of congressional reapportionment").

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[4] The DOJ presented a plan containing a slightly lower overall deviation than the Court's plan. However, its plan split numerous counties outside of the metropolitan Atlanta area, apparently for racial reasons. Whether the DOJ should be involved in this, the map-generation phase of the redistricting process is questionable. Normally, Georgia would originate a plan for DOJ preclearance under VRA Section 5. Regrettably, we are standing in the state's shoes, and our plan is not subject to Section 5 in any event.

Georgia has preferred to split counties only in the Atlanta area where division was necessary because of Atlanta's dense population relative to other areas of the state. We did rearrange precincts in the Atlanta area for purposes of achieving better deviations.[5] Of course, we attempted to avoid splitting voting precincts (with the exception of Cobb and Clayton Counties)[6] due to Georgia's preference against that practice.[7] The unconstitutional plan splits twenty-eight

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[5] The Court was able to achieve such low deviations by placing Talbot County in the Third District, thereby reducing the Second District's deviation to -.23%. This also allowed a transfer of population from the Third District to the under-populated Fifth District. The Fifth District does extend into Dekalb County somewhat, an extension necessary to allow other precincts in the Atlanta area to be relocated in order to achieve vastly improved deviation, and also keep the City of Atlanta wholly within the Fifth District. The Court's splitting of Dekalb and other Atlanta area counties is consistent with the Georgia General Assembly's decision to split those counties due to the heavy population concentrations in that region of the state.

[6] A look at a map of the City of Marietta and Cobb County reveals that every plan drawn at any level (county commission, state house, state senate, and congressional) must of necessity split some precincts in the Marietta-Cobb County area because of an annexation pattern that created noncontiguous enclaves and exclaves. There are pieces of the city that are islands in the county and vice versa. Def. Exh. 92.

In Clayton County, two precincts were split along already existing school board or county commission lines, and a third was split along a major geographical features. These enabled the Court to achieve lower deviations in the Third and Fifth Districts without causing the problems discussed in footnote seven, *infra*.

[7] As we have noted:

> [O]ne bad side effect of the splitting of units as small as precincts for racial purposes occurs when the precinct is divided in one way for a state house seat,

precincts in the Second District alone (seventy overall), all predominantly for racial reasons. *Johnson* III, at 6. The product of the Court's efforts is a lower overall deviation than Georgia's 1982 and 1992 plans.

However, maintaining political subdivisions (counties) cannot alone justify less than perfect deviation in a court plan. *Cf. Karcher,* 462 U.S. at 740 ("we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts"); *Weiser,* 412 U.S. 783 (1973) (mandating strict adherence to legislative policies). We therefore considered splitting counties outside of the Atlanta area, but other factors unique to Georgia militated against it.

Other factors causing the slight deviation include maintenance of core districts and communities of interest. Georgia has historically preferred to maintain the core of each district during reapportionment. Cf. 1972 Plan, Def. Exh. 14, and 1982 Plan, Pl. Exh. 41, Def. Exh. 15. Our

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> another way for a state senate seat, and yet a different way for a congressional seat. When this kind of gerrymandering is repeated often enough, the voting combinations are so rare . . . that a secret ballot becomes difficult for some voters.

Johnson III at 6 n.3; Second Trl. Trans. at 28. The Court believes the same result could obtain from splitting precincts for any reason, not only racial. Thus, except in one instance, the Court avoided splitting precincts unless they were split in the same manner at other election levels, and then only where absolutely necessary. The new split precinct has its boundaries along easily identified major roadways.

remedy maintains ninety-five counties (totally or partially) in the same districts as they were located in the 1982 plan – significant given the addition of the Eleventh District, which in the remedy contains thirteen counties.

Maintaining county boundaries also helps to ensure that communities of interest are maintained within the same district. Residents of a particular county are similarly affected by the decisions of their elected representatives. People who share communities of interest logically belong within the same congressional district. *See Johnson* II, 132 L.Ed.2d at 782 (discussing significance of communities of interest).

Incidentally, a factor unique to Georgia, and one which enables a draftsman to reach near perfect deviations without splitting counties, is the number of Georgia counties: 159. Most of the counties are more sparsely populated than the Atlanta area counties. With such a high number of counties, we were able to achieve extremely low deviations without splitting non-Atlanta area counties. *Cf. Mahon v. Howell,* 410 U.S. 315, 321 (1973) (allowing states to "use political subdivision lines to a greater extent in establishing state legislative districts" because of the greater number of state legislative districts to be apportioned as compared to the lesser number of congressional districts), *modified* 411 U.S. 922 (1973).[8] As we have noted:

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[8] The correspondingly high number of counties in Georgia afforded the Court the same opportunity to maintain county boundaries (outside of metropolitan Atlanta counties) among the eleven congressional districts.

> With the exception of Texas, Georgia has more counties than any other state in the Union; one would think that such a proliferation would provide ample building blocks for acceptable voting districts without chopping any of those blocks in half.

Johnson I, 864 F. Supp. at 1377.

In the calculus of district population deviation, our only measure of the state's demographics is the decennial census. Since the population is not static, we adhered to the fiction that the census block figures are accurate to the exclusion of all others. In 1995, no precise count of a district's population can be made using 1990 data. We are halfway through the decade. Changes have occurred in Georgia. *See, e.g.,* footnote 17, *infra.* In sum, using the available data and whole counties outside of the Atlanta area, our remedy is probably as close to "zero deviation" as one can be. At this point in the decade, the deviation effort is largely theoretical. The real data, known only to providence, would doubtlessly lead us to another result.

Yes, we remain sensitive to the extant deviation, so we now explain the other factors we were compelled to consider.

B. Adherence to Georgia's Historic Districting Preferences

1. Source of Georgia Legislature's Intentions

Since redistricting is an inherently political process, federal courts undertaking the task must adhere to the state's historical districting preferences and traditions.

Upham, 456 U.S. at 39; *Weiser,* 412 U.S. at 795. The problem facing the Court was that, unlike the situation in *Upham,* Georgia's current plan does not represent the political will of Georgia's citizens. *See* Part I, *supra.* The issue then became where we should look to divine Georgia's true political will. Given the unique events of Georgia's 1992 redistricting process, the Court has a better understanding of what the legislature might have done had it not been for the DOJ's subversion of the redistricting process.

We drew upon Georgia's 1972 plan and 1982 plan, as well as the first plan enacted in 1992,[9] to determine how the legislature typically maintains district cores from one plan to another. Our first hurdle was where to locate the new Eleventh District. Since significant population growth is occurring in the Atlanta area, it follows that the new district would be created where future growth is anticipated. Carving the new district where growth is projected allowed us to include fewer counties within the district, consequently enabling us to better maintain district cores.

We placed the new Eleventh District in the Northeast Atlanta corridor out to the northeast Georgia state line. The Eleventh district now contains counties which are

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[9] The first 1992 plan gave us a clearer understanding of legislative intent, but it was not a perfect guide since it contained many of the same features in its Eleventh District that found their way into the unconstitutional Eleventh – connecting the south Dekalb County urban minority population with the primarily rural east Georgia minority population.

becoming more urban with the population growth, notably Walton County and Newton County. Eleventh Trl. Trans. III at 26. The Eleventh also contains the Athens-Clarke County area which has become a metropolitan area in its own right, and locating it in the Eleventh is consistent with the new Eleventh's urban/suburban flavor. *Id.*

The resulting Eleventh District is a relatively compact grouping of counties which follow a suburban to rural progression and have Interstate Eighty-Five as a very real connecting cable. The road net, the area's commerce, its recreational aspect, and other features produce a district with a palpable community of interests. As a "radius" district reaching from suburban Atlanta to the state line, the new Eleventh has an analogous resemblance to the Third, Seventh, and Ninth Districts.

Georgia's Tenth District has historically been located in the east-central portion of the state, with Augusta as its main hub. Eleventh Trl. Trans. III at 26; 1940 Plan, Jt. Exh. 16; 1972 plan. Addition of the Eleventh precipitated a shift in the Tenth District south, but the Tenth retains Augusta as its main hub and retains its primarily rural character. The Court began here, and the remainder of the remedy fell into place along the lines of Georgia's historic plans, maintaining district cores where possible.

2. Georgia's Traditional Districting Factors

While Georgia's legislature considers many factors in the apportionment process, there are a few factors that have historically guided the legislature in the process more so than others and which are evident in the plans it

has historically enacted.[10] These factors, all of which have heavily influenced past apportionment plans in Georgia, are the primary factors that guided our development of this remedy. We explore some of them below, and we note that consideration of them was tempered by the one person-one vote principle.

a. Maintaining Political Subdivisions

The Georgia General Assembly has strongly adhered to the principle of maintaining counties within the same congressional district. Georgia did not split a county until 1972, when it was necessary to do so because of the dense population in the metropolitan Atlanta area. *See* 1972 Map. The 1982 plan only split three counties, again in the Atlanta area for population density reasons.[11] Eleventh Trl. Trans. III at 36. Likewise, our remedy splits only six counties, all within the Atlanta area, and all split for population density reasons.[12] In comparison, the current

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[10] Other factors the legislature has considered include avoiding contests between incumbents, drawing districts to include certain state political officers, and drawing districts so as to avoid having certain state officers represented by members of the opposite political party. Eleventh Trl. Trans. III at 21. Because these were not predominant factors the state has considered in the past, they were given less weight since they are inherently more political in nature than the more objective factors.

[11] As noted above, the large number of counties in Georgia affords a draftsman much flexibility in achieving near perfect deviation numbers while maintaining county boundary lines.

[12] Evidence showed that the significant population growth in Georgia is occurring in the metropolitan Atlanta area. Given the population density of those counties, it would be impossible to avoid splitting any counties.

unconstitutional plan split twenty-three counties, seventeen of which were split for no reason other than race.

Maintaining Dekalb County entirely within one district was a feature of several plans submitted to the Court. However, we chose to split Dekalb, removing a few voting precincts from the Fourth District and placing them in the Fifth District in order to achieve near perfect deviations in those Districts.[13] The other reasons for doing this were: 1) the Georgia legislature has already made the political decision to split Dekalb for population density reasons, first in 1982, and again in each of the three plans presented to the DOJ for preclearance in 1992; 2) the result was an increase in the Fifth District's minority voting age population from fifty-three precent to fifty-seven percent, an increase most likely required by the VRA;[14] and 3) the City of Atlanta, a significant political subdivision in its own right, is encompassed completely by the Fifth District.

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[13] Since Dekalb County is a densely populated county in the Atlanta area, splitting it is acceptable under the one person-one vote principle. The legislature split it in the past to comply with that principle.

[14] *See* Part II(B)(2)(t)(1)(iii) (discussing the importance of maintaining black percentage of registered voters as close to fifty-five percent as possible). With the exception of four Dekalb precincts moved to the Fifth District, the rest of the Dekalb precincts were part of the Fifth in the 1982 plan and remain in the Fifth under our plan.

b. Four "Corner Districts"

Georgia historically has maintained four "corner districts" in its Congressional plans. Eleventh Trl. Trans. III at 23-27. The four "corner" districts include: 1) the southeastern coastal district, comprising the coastal counties and the other counties most closely related to them; 2) an agrarian district in southwest Georgia, prominent for its peanut production; 3) the northwestern corner, known for its carpet production and isolated from the northeast Georgia counties by mountains; and 4) the northeastern corner, identified by its preeminent position in poultry production. Maintaining these districts is consistent with the community of interest factor approved by the Supreme Court. *Johnson* II, at 782. Our remedy adheres to all of these objectives with the exception of the northeast corner district, a necessary consequence of adding an eleventh district and the shift in counties that it precipitated.

c. Urban Minority District

In 1972 Georgia created an urban minority district in the Atlanta area to comply with the VRA. This is Georgia's sole majority-minority congressional district. Recognition of the Fifth District as an urban minority district resulted from voting rights litigation in the early seventies. Eleventh Trl. Trans. III at 27. Since race is a factor this Court can *consider*, we considered it insofar as the legislature would have considered it in maintaining one majority-minority district or else run afoul of VRA Sections 2 and 5.

Unlike the unconstitutional Eleventh District, Fifth District residents have a strong community of interest, and the geography of the district itself is compact and meets contiguity requirements. *See* Jt. Exh. 15; Jt. Exh. 1; Remedy, Appendix A. Also, Section 2 of the VRA required the Court to maintain the Fifth District as a majority-minority district. *See* Part II(B)(2)(f)(1), *infra*.

d. Maintaining District Cores

Georgia's legislature has historically sought to maintain district cores from one plan to another. The 1972, 1982, and the three 1992 plans that passed the legislature evidence this legislative preference. Our remedy bears a striking resemblance to these earlier plans, especially in the rural districts such as the First, Second, Eighth, and Ninth. *See* Part II(A), supra (noting that the remedy maintains ninety-five counties in the same districts as they were located in the 1982 plan, and the new Eleventh District contains thirteen of the remaining counties).

e. Protecting Incumbents

Georgia has historically sought to draw district lines so incumbents remain in their districts in a new plan and to avoid placing two incumbents in the same district. The Court considered this factor, but since it is inherently more political than factors such as communities of interest and compactness, we subordinated it to the other considerations. We note, however, that our remedy places incumbents in the same district in only two districts, while keeping eight incumbents in their present districts.

The remedy's Eight and Eleventh Districts do not currently have incumbents as residents. The incumbent from the former Eighth District resides in the remedy's Second District, and the Eleventh District incumbent resides in the remedy's Fourth District.

f. Voting Rights Act

1. Section 2

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, applies to any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . imposed or applied by any State or political subdivision. . . . " 42 U.S.C. § 1973(a). A plain reading of the statute would lead one to believe that Section 2 does not apply to a court-drawn and ordered redistricting plan. *See Holder v. Hall*, ___ U.S. ___; 129 L.Ed.2d 687 (1994) (Thomas, J. Dissenting). However, Section 2 does apply to certain cases in which a federal court orders a redistricting plan into effect. *See United States v. Dallas Cnty. Comm'n*, 850 F.2d 1433 (11th Cir. 1988) (holding that any proposed remedy for a *Section 2 violation* must meet Section 2 requirements), *cert. denied*, 490 U.S. 1030 (1989).

During the remedy phase of the hearing, a significant portion of the argument centered on whether the Court's remedy would be required by Section 2 to contain two majority-minority districts. We have considered Section 2 and the case law construing it, and we conclude that two majority-minority districts are not required by Section 2 because including two such districts would violate *Johnson* II's principles.

i) When Section 2 Requires Creation of a Majority-Minority District

States run afoul of Section 2 when they draw district lines which have the "*effect* of denying a protected class the equal opportunity to elect its candidate of choice." *Voinovich v. Quilter*, ___ U.S. ___, 122 L.Ed.2d 500, 512 (1993) (emphasis in original). Section 2 mandates that courts look at the totality of the circumstances when determining whether a violation exists. 42 U.S.C. § 1973(b). Plaintiffs establish a Section 2 violation by proving three factors, as first stated in *Thornburg v. Gingles*, 470 U.S. 30 (1986): (1) that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district;' . . . (2) that the minority group 'is politically cohesive; . . . [and] (3) that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' " *Voinovich*, 122 L.Ed.2d at 513-14 (quoting *Growe*, 122 L.Ed.2d at 403). However, these factors are not to be applied mechanically, *Johnson v. DeGrandy*, ___ U.S. ___; 114 S.Ct. 2647, 2655 (1994); *Voinovich*, 122 L.Ed.2d at 514, and while they are the preconditions a plaintiff must first establish to prove a Section 2 violation, they must be considered along with other factors when analyzing a Section 2 claim. *DeGrandy*, 114 S.Ct. at 2657.

ii) Why Section 2 Does Not Require a Second Majority-Minority District in Georgia

Ample evidence has been presented during the two trials to enable the Court to determine that Section 2 does not require creation of a second majority-minority district

in Georgia – due primarily to the geographic dispersion of its minority population and lack of any significant vote polarization. Creating a second majority-minority district would also violate the Supreme Court mandate under which we now operate because *Johnson* II held that the VRA cannot be applied to reach an unconstitutional result.

Analysis of a racial map of Georgia reveals that the state's minority population is widely dispersed.[15] In fashioning a remedy, we considered the possibility of creating a second majority-minority district and concluded that to do so would require us to subordinate Georgia's traditional districting policies and consider race predominantly, to the exclusion of both constitutional norms and common sense. Such a plan would directly contravene the Supreme Court's holding in *Johnson* II that race cannot predominate in the redistricting context absent a compelling justification for it. 132 L.Ed.2d at 782. Nonracial

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[15] There are heavy minority concentrations in south Dekalb and Fulton counties, east central Georgia (most of which is in the new Eleventh District), southeast Georgia in the coastal region (all of which are included in the new First District), the southwest corner of Georgia, and a concentration in the west-central portion of the state. Pl. Exhs. 17-23, 36-40. *Cf.* Def. Exh. 17; U.S. Exhs. 8-16. The only way Georgia could draw a majority-minority district in the southwest corner of the state was to use "narrow land bridges . . . and . . . a number of irregular appendages." *Johnson* III, at 6. The only way Georgia could create a majority-minority district out of the minority concentrations in east central Georgia was to link that rural minority population, again using land bridges and appendages, to the large urban minority population in south Dekalb County. *See* 1992 Plan. We will not repeat the same mistake.

factors do not support creation of a second majority-minority district largely because Georgia's minority population is not geographically compact. *DeGrandy*, 114 S.Ct. at 2655. Creating a second majority-minority district would require this Court to engage in the unconstitutional racial gerrymandering characteristic of the plan we now replace. Georgians deserve a better fate. "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute . . . to demand the very racial stereotyping the Fourteenth Amendment forbids." *Johnson* II at 787.[16]

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[16] Georgia could consider race as a predominant factor in redistricting if such a consideration was necessary to meet strict scrutiny, *Johnson* II, 132 L.Ed.2d at 782. We cannot subvert Georgia's traditional districting principles in order to draw a second majority-minority district. If Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so. The VRA does not require proportional representation, however. *See, e.g., White v. Regester*, 412 U.S. 755, 765-66 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 148-56 (1971). As the Supreme Court stated in *Shaw v. Reno*:

> The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. . . . That system, by whatever name it is called, is a divisive force in the community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense.

125 L.Ed.2d 511, 529 (1993) (quoting Justice Douglas' dissent in *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1964)).

At the remedy phase of the October, 1995 hearing, the counsel for the Speaker of Georgia's House of Representatives

Statistical evidence pertaining to statewide voting patterns in Georgia showed a significant degree of crossover voting. *Johnson* I, 864 F. Supp. at 1390. We observed that "[b]lack and black-preferred candidates in Georgia have achieved many electoral victories in local and statewide elections and have received significant – occasionally overwhelming – support from both black and white voters within the Eleventh Congressional District." *Id.* at 1390-91. During the Second District trial, Linda Meggers stated that election results in that district indicated white crossover voting. Second Trl. Trans. at 438. Indeed, Congressman Sanford Bishop, the black Congressman currently representing the Second District, agreed. *Id.* at 142. There is conflicting evidence on the degree of vote polarization in Georgia. This much is clear: while some degree of vote polarization exists, it is "not in alarming qualities." *Johnson* I, 864 F. Supp. at 1390. The

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observed that if the Court did include a second majority-minority district, it would be "set in stone." He contended that, since future plans would be measured against the Court's plan for purposes of VRA analysis, Georgia's legislature would be hamstrung to relocate the district elsewhere, or to alter the mix of counties included within the district, for fear of violating the VRA. Counsel for Amicus Curiae agreed, which is significant since the Amicus plan contains two majority-minority districts. *Cf. Johnson* I, 864 F. Supp. at 1386 (noting problems a plan attempting to give minorities proportional representation could present in drafting future plans to satisfy VRA). Since political considerations pervade the redistricting task, the Court feels that any permanent footprint left on Georgia's political landscape, especially one with such dangerous side effects as the Supreme Court has noted, should be left to those elected to make such decisions. In other words, we feel the need to intrude as little as possible in this inherently political territory.

second and third *Gingles* preconditions therefore would not be met in a Section 2 challenge to the remedy. Thus, the remedy we now impose meets the requirements of Section 2 without containing two majority-minority districts.

We note that several districts in the remedy do contain significant minority populations which could influence election results. The 1982 plan contained five districts with a minority population of greater than twenty-five percent, and three with a minority population of greater than thirty-five percent. Our remedy contains six districts with a minority voting age population of greater than twenty-five percent, and two districts, the Fifth and the Second, with a minority voting age population of greater than thirty-five percent, while the remedy's Tenth comes close to that with a minority voting age population of more than thirty-four percent. The remedy's minority percentage per district are comparable to those in the 1982 plan, even with the addition of the Eleventh District.

While we were required to use the 1990 census numbers in formulating the remedy, we note the demographic trend indicating that Dekalb County's population, which comprises the majority of the remedy's Fourth District, is becoming more heavily minority. This means that the Fourth District has the potential to become a very strong minority influence district or a majority-minority district as Georgia is reapportioned following future censuses, if it is not already.[17]

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[17] In its response to the Court's request for additional demographic information concerning minority population trends in Dekalb County, the State Defendants produced an affidavit of Linda Meggers. Ms. Meggers attests that while in 1990 27.4% of Dekalb County's registered voters were black, that number had increased to 35.7% by 1994. Meggers' 11/21/95 Aff. ¶ 7. She indicated the number could be as high as 39.4% in 1995, but that that number is due to a new voter registration law more than population shifts. *Id.* at ¶¶ 7-9. In any event, while the Court is bound to use 1990 census figures in formulating a remedy, we cannot ignore the strong trends in Dekalb County which indicate the remedy's Fourth District may be a stronger minority influence district than data based on the 1990 census would indicate.

The Abrams Intervenors do not dispute Meggers' figures; they only caution the Court that those figures must be viewed in light of the overall change in percentages for each district because some may have lost minority population. Their warning is duly noted.

iii) What Section 2 Does Require

While Section 2 does not require the Court to create a second majority-minority district, it does require maintenance of the Fifth District as a majority-minority district. The minority population in the Fifth District is sufficiently compact and, being an urban minority population, has a sufficiently strong community of interest to warrant being a majority-minority district. Compliance with the VRA required creating the Fifth as majority-minority in 1972. Eleventh Trl. Trans. III at 27. As a result of 1982 litigation, the Fifth District was required to have a minority population of sixty-five percent. *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

The minority population of sixty-one percent, minority voting age population of fifty-seven percent, and a black registered voter percentage of fifty-four percent in

the remedy's Fifth District does not result in a dilution of the rights of that district's minorities. Dr. Katz, the most credible statistical expert at the first trial, identified a "significant majority" minority district as one having fifty-five to sixty percent of black registered voters. *See* Katz Rep. at 22. We endeavored to maintain the black percentage of registered voters in the Fifth District as close to fifty-five percent as possible. Expert testimony at the Eleventh District trial indicated a significant drop in the probability of a black candidate being elected as the black percentage of registered voters declines to fifty percent. Katz Rep. at tab 5. The probability of electing a black candidate is below fifty percent when the percentage of black registered voters equals fifty percent. *Id.* Therefore, maintaining the percentage of black registered voters as close to fifty-five percent as possible was necessary, in our view, to avoid dilution of the Fifth District minorities' rights.[18]

The minority population of the Fifth District in the 1982 plan was sixty-five percent in order for Georgia to comply with the VRA. *Busbee, supra.* We felt that allowing the minority population to fall below sixty percent might be viewed as dilutive at some level. The minority population in the remedy's Fifth District is just shy of sixty-two percent.[19]

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[18] While we noted flaws in these analyses in *Johnson* I, these provide the most probative analyses we have which indicate what might be dilutive in the Fifth District. These statistics are based on statewide figures, though. The Court hesitates to rely on statistical data using percentages of black *registered* voters as its basis since that in essence condones voter apathy.

[19] We believe minority voting age population is the appropriate measure for dilution analysis. We offer minority population percentages strictly for comparison purposes since that is what the *Busbee* court focused on in essentially forcing Georgia to create a Fifth District in 1982 with a minority population of 65%.

2) Section 5

VRA Section 5 requires certain states which have a history of discriminating against minorities to seek preclearance from the U.S. Attorney General prior to implementing a new districting or apportionment plan. 42 U.S.C. § 1973c. However, "[a] decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act." *Connor v. Johnson,* 402 U.S. 690, 691 (1971); *McDaniel v. Sanchez,* 452 U.S. 130, 138 (1981). Thus, this Court is not required to seek the preclearance of the Attorney General prior to implementing its plan. The Court does note that its remedy is not retrogressive to the rights of minorities when compared to the 1982 plan,[20] and it does not violate Section 5 for the same primary reasons that it does not violate Section 2.

Connor notwithstanding, some court-ordered plans have been subject to Section 5 and its requirements. In

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[20] Debate arose at the August, 1995 hearing and the October, 1995 trial as to whether the current plan or the 1982 plan is the appropriate benchmark for retrogression analysis. Interestingly, the DOJ asserted that the unconstitutional plan should be used, contravening 28 C.F.R. § 51.54(b)(1) which dictates using the last constitutional plan on the ground if the current plan is unconstitutional. Since the Court is in the position of replicating the legislative task as it existed in 1992, the 1982 plan should serve as a guide. Of course, since the Court's plan is not subject to Section 5 preclearance, the point is academic.

Sanchez, the Supreme Court held that Section 5's preclearance requirement did apply to a reapportionment plan submitted to a federal court by the legislative body of a jurisdiction covered by Section 5. 452 U.S. at 153.

It could be argued that the Court's remedy is a legislative plan since it resembles some of the legislative plans, including the unconstitutional one. To varying extents we relied upon the three enacted 1992 plans, as well as the 1972 and 1982 plans, to determine how the legislature maintains district cores and communities of interest, so some similarity to those plans is inevitable.

However, the Court's plan is its own. While it may resemble one or more of several plans presented to us, as a member of this Court observed during the remedy phase of the hearings: "There could come a time when even the fertility of Herschel the [reapportionment] computer is exhausted and we have received a finite number of maps. . . . If we extend that logic we are going to be rubber stamping somebody's plan, but I suspect that what we'll do will be our own unique product." Second Trl. Trans. at 409.

So the remedy we now order is not the product of Georgia's legislature. We of course would have preferred for the legislature to have fulfilled its obligation and formulated a districting plan for Georgia. Alas, none was presented to us.[21] We therefore have formulated our remedy in adherence to constitutional norms and deference

[21] Some members of the General Assembly did present plans to the Court, but none purported to be the actual product of the General Assembly. Nevertheless we considered them along with the other plans presented to us during this process.

to the legislature's historical preferences. Therefore, it is not subject to preclearance under VRA Section 5.

III. Conclusion

The Court has fashioned a plan to remedy Georgia's current, unconstitutional districting plan. In arriving at this remedy, we adhered as closely as possible to the Supreme Court's mandate in *Johnson* II, the principle of one person-one vote, and Georgia's traditional legislative goals and traditions. Adopting a remedy that would be truly minimally disruptive to Georgia's current plan was not an option. No plan of congressional redistricting created by court or legislature will achieve perfection. There are too many practical, political, and altogether human features in the equation. We do no harm with this plan, which cures the unconstitutionality of the former and can serve in "caretaker" status until the legislature convenes to change it. That may occur following the millennium census, or before.

Noting again the reluctance with which the task was undertaken, it is hereby **ORDERED** and **DECREED** that henceforth all elections for the members of the House of Representatives of the Congress of the United States from the State of Georgia shall be conducted in accordance with the plan which is appended hereto as Appendices "A" and "B".

SO ORDERED, this 13th day of December, 1995.

/s/ B. Avant Edenfield
B. AVANT EDENFIELD,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT
SOUTHERN DISTRICT
OF GEORGIA

/s/ Dudley H. Bowen, Jr.
DUDLEY H. BOWEN, JR.
UNITED STATES DISTRICT
COURT
SOUTHERN DISTRICT
OF GEORGIA

Johnson, et al. v. Miller, et al., No. CV 194-008 (S.D. Ga.) (three-judge court)

EDMONDSON, Circuit Judge, dissents. JLE

Tract:0310.01
Block Group:1
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Block Group:6
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Block Group:8
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Tract:0311.06
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Block Group:5
Tract:0311.07

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Tract:0311.08
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Tract:0312.02
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Block Group:4
Block Group:5
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Tract:0314.04
Tract:0314.98
Tract:0315.01
Tract:0315.02
Tract:0316.97

DOUGLAS
FLOYD
HARALSON
HEARD
PAULDING
POLK
TROUP

District No. 8

APPLING
ATKINSON
BACON
BEN HILL
BERRIEN
BIBB
BLECKLEY
CHARLTON
CLINCH
COFFEE
CRAWFORD
DODGE
DOOLY
ECHOLS
HOUSTON
IRWIN
JEFF DAVIS
LAMAR
LANIER
MONROE
MONTGOMERY
PEACH
PULASKI
TELFAIR
TREUTLEN
TWIGGS
UPSON
WARE

WHEELER
WILCOX

District No. 9

CATOOSA
CHEROKEE
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Tract:0902.
Tract:0903.
Tract:0904.
Tract:0905.
Tract:0906.
Tract:0907.
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Block Group:2
Block Group:3
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DADE
DAWSON
FANNIN
FORSYTH
GILMER
GORDON
HABERSHAM
HALL
LUMPKIN
MURRAY
PICKENS

RABUN
STEPHENS
TOWNS
UNION
WALKER
WHITE
WHITFIELD

District No. 10

BALDWIN
BURKE
BUTTS
COLUMBIA
ELBERT
EMANUEL
GLASCOCK
GREENE
HANCOCK
JASPER
JEFFERSON
JOHNSON
JONES
LAURENS
LINCOLN
MCDUFFIE
OGLETHORPE
PUTNAM
RICHMOND
TALIAFERRO
WARREN
WASHINGTON
WILKES
WILKINSON

District No. 11

BANKS
BARROW
CLARKE

FRANKLIN
GWINNETT
Tract:0501.01
Block Group:1
Block Group:2
Block Group:3
Block Group:4
Block: 501, 502, 503, 504, 505, 506, 507, 508, 509, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 532, 533, 534, 535A, 535B, 536A, 536B
Block Group:7
Block Group:8
Tract:0501.02
Tract:0502.02
Block: 132, 133, 152A, 152B, 152C, 152D, 152E, 152F, 153A, 153B, 153C, 155, 156, 157
Tract:0504.03
Block Group:1
Block: 202
Block Group:3
Block Group:4
Block Group:5
Block Group:9
Tract:0504.09
Block Group:1
Tract:0504.10
Block Group:1
Block Group:2
Block Group:3
Block: 402, 403
Block Group:5
Block Group:6
Block Group:7

Tract:0504.11
Block Group:1
Block Group:2
Block Group:3
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Block Group:5
Block Group:6
Block Group:7
Tract:0504.12
Tract:0504.13
Tract:0504.14
Tract:0504.15
Tract:0504.16
Tract:0505.02
Block: 134A, 134B
Tract:0505.03
Block: 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115
That part of Block 117 which lies south and east of Taylor Road
Block: 120, 121, 122, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 140, 145, 146, 156, 157, 158, 159, 160, 161, 167, 191, 192, 193, 211, 223, 224
Tract:0505.05
Tract:0505.06
Tract:0505.07
Tract:0505.08
Block Group:1
Block Group:3
Block Group:4
Block Group:5
Block Group:6
Block Group:7
Block Group:8

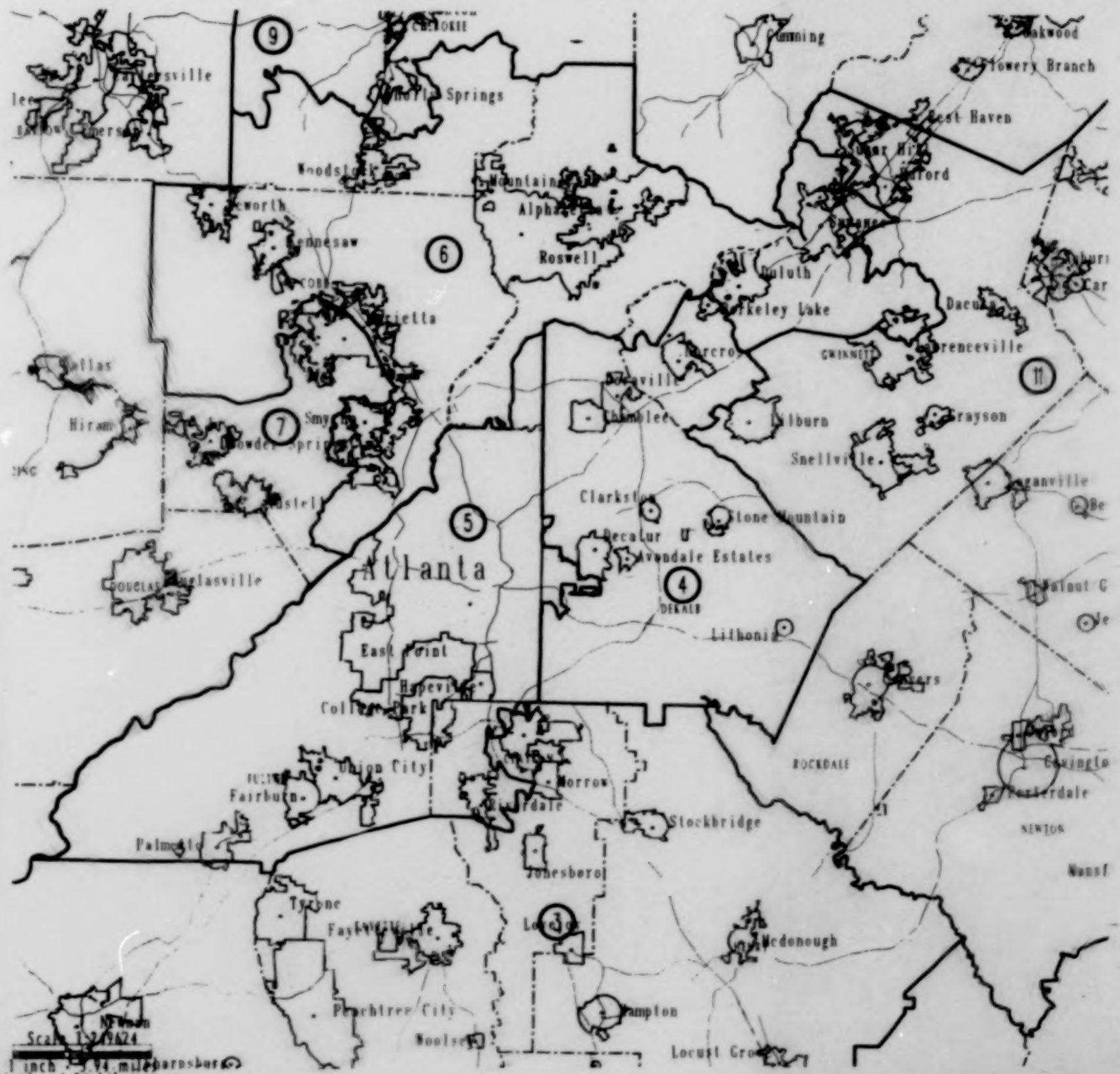
Tract:0505.09
Block Group:1
Block Group:3
Block Group:4
Block Group:5
Block Group:6
Tract:0506.01
Tract:0506.02
Tract:0507.04
Tract:0507.05
Tract:0507.06
Tract:0507.07
Tract:0507.08
Tract:0507.09
Tract:0507.10
Tract:0507.11
HART
JACKSON
MADISON
MORGAN
NEWTON
OCONEE
ROCKDALE
WALTON

(NOTE: VAP = Voting Age Population)

District Number	Total Pop % Deviaton	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
1	588541	179809	426558	118631
	-0.07	30.55	72.40	27.81
2	587503	230419	415407	145948
	-0.23	39.21	70.70	35.13
3	589630	145377	424974	95713
	0.12	24.66	73.07	22.52
4	589322	215700	450500	147784
	0.07	36.60	76.44	32.00
5	589359	365330	442885	253212
	0.07	61.99	75.15	57.17
6	589600	37597	440475	27122
	0.11	6.38	74.71	6.16
7	589405	77871	432603	51911
	0.08	13.21	73.41	12.00
8	587912	182636	425122	120107
	-0.17	31.07	72.31	28.25
9	589420	21520	439083	15164
	0.08	3.65	74.49	3.45
10	588046	220803	423299	145950
	-0.15	37.55	71.98	34.48
11	589398	69503	429927	46600
	0.08	11.79	72.94	10.84
Totals	6478216	1746565	4750913	1168142

Number of Districts	:	11		
Members Per District	:	1		
Ideal District Size	:	588929		
Average Deviation (%)	:	0.11		
Deviation Range (%)	:	-0.23	to	0.12
Overall Deviation (%)	:	0.35		

(DATA SOURCE: 1990 US Census PL94-171 Population Counts)
(NOTE: Districts numbered >200 are used as special accumulators.)
(They are not included in avg or % range calculations.)



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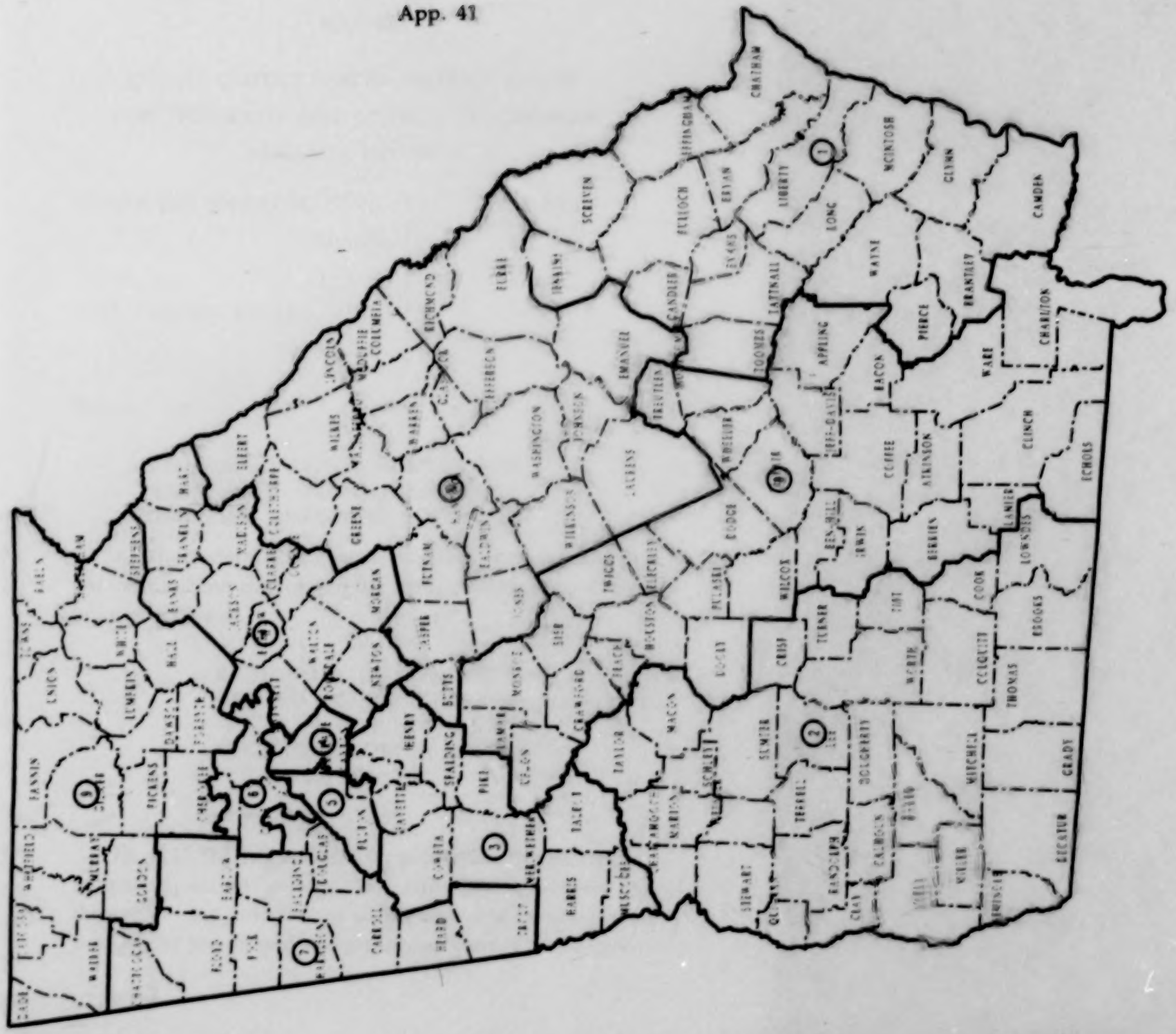
CHATHAM
SCREVEN
EFFINGHAM
EVANS
LIBERTY
MCINTOSH
GLYNN
CAMDEN
LONG
WAYNE
BRYAN
BULLOCH
TATTNALL
TOOMBS
APPLING
PIERCE
BRANTLEY
CHARLTON
WARE
BACON
CLINCH
ECHOLS
LANIER
BERRIEN
COFFEE
ATKINSON
JEFF DAVIS
TELFAIR
WILCOX
DODGE
TURNER
WORTH
COOK
BROOKS
THOMAS
COLQUITT
GRADY
DECATUR
SEMINOLE
MILLER
MITCHELL
BAKER
CALHOUN
EARLY
RANDOLPH
TERRELL
DOUGHERTY
LEE
SUMTER
WEBSTER
STEWART
QUITMAN
CLAY
CALHOUN
GORDON
WILKINSON
JOHNSON
EMANUEL
JEFFERSON
RICHMOND
BURKE
JENKINS
TREUTLEN
WHEELER
TELFAIR
WILCOX
DODGE
BLECKLEY
PULASKI
CRISP
DOOLY
WILCOX
TURNER
WORTH
COOK
BROOKS
LOWNDES
BERRIEN
LANIER
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WARE
CHARLTON
PIERCE
BRANTLEY
WAYNE
LONG
MCINTOSH
GLYNN
CAMDEN
CHATHAM
SCREVEN
EFFINGHAM
EVANS
BRYAN
LIBERTY
BULLOCH
TATTNALL
TOOMBS
APPLING
BACON
JEFF DAVIS
COFFEE
ATKINSON

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DIVIDA [sic] JOHNSON, ET AL., Plaintiffs vs. ZELL MILLER, ET AL., Defendants.	FILE NO. CV194-008

Before:

Honorable JAMES L. EDMONDSON
Honorable B. AVANT EDENFIELD
Honorable DUDLEY H. BOWEN, JR.

At The Federal Courthouse Building, Augusta, Georgia, on the 22nd day of August 1995, commencing at the hour of 9:00 a.m.

RICHARD A. DUERINGER,
CERTIFIED COURT REPORTER
P. O. BOX 2106
AUGUSTA, GEORGIA 30903
(706) 790-6212

* * *

[p. 111] The Abrams intervenors will not participate in that stipulation process. Nor will they participate in the evidentiary proceedings on the matter of the constitutionality of the Second Congressional District of Georgia.

It is our view that there is no need for intervenors in this litigation. The record is that the State of Georgia and its elected officials will defend the congressional districts that were enacted by the legislature to the full extent of the law. We [p. 112] have seen that and we expect that they will do that again and therefore we see no need to have intervenors.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DAVIDA JOHNSON; PAM BURKE; HENRY ZITTROUER; GEORGE L. DELOACH; and GEORGE SEATON,	)	CV 194-008
Plaintiffs,	)	
v.	)	
ZELL MILLER, in his official capacity as Governor of the State of Georgia; et al.,	)	
Defendants.	)	

Before EDMONDSON, Circuit Judge; EDENFIELD, Chief Judge; and BOWEN, District Judge.

ORDER

(Filed Jan. 8, 1996)

The Abrams Intervenors filed a Motion for Hearing and Reconsideration asking this Court to reconsider the imposition of our remedy. After careful consideration, the Intervenors' motion is **DENIED**.

SO ORDERED, this 8th day of January, 1996.

/s/ J. L. Edmondson
J. L. EDMONDSON,
CIRCUIT JUDGE
UNITED STATES ELEVENTH
CIRCUIT COURT OF APPEALS

/s/ B. Avant Edenfield
B. AVANT EDENFIELD,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT
OF GEORGIA

/s/ Dudley H. Bowen, Jr.
DUDLEY H. BOWEN, JR.
UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT
OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DAVIDA JOHNSON; PAM BURKE; HENRY ZITTROUER; GEORGE L. DELOACH; and GEORGE SEATON,

Plaintiffs,

v.

ZELL MILLER, in his official capacity as Governor of the State of Georgia; PIERRE HOWARD, in his official capacity as Lieutenant Governor of the State of Georgia and President of the Georgia Senate; THOMAS MURPHY, in his official capacity as Speaker of the Georgia House of Representatives; and MAX CLELAND, in his official capacity as Secretary of State of the State of Georgia,

Defendants,

and

LUCIOUS ABRAMS, JR.; REV. G. L. AVERY; WILLIAM GARY CHAMBERS, SR.; and KAREN WATSON,

Defendant-Intervenors,

UNITED STATES OF AMERICA,

Defendant-Intervenor.

Civil Action No.
CV 194-008

NOTICE OF APPEAL

(Filed Jan. 11, 1996)

Notice is hereby given that Lucious Abrams, Jr., Rev. G. L. Avery, William Gary Chambers, Sr., and Karen Watson, Defendant Intervenors in the above named case, hereby appeal to the Supreme Court of the United States pursuant to 28 U.S.C. § 1253 from the Order of the three judge court implementing a court ordered redistricting plan for Georgia's congressional districts entered in this action on December 13, 1995, the Order of the Court entered on August 22, 1995, denying intervention to defend the constitutionality of Georgia's Second Congressional District, and the Order of the Court entered on January 8, 1995 denying their motion for hearing and reconsideration.

Respectfully submitted,

/s/ Laughlin McDonald
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Article 1, Section 2, Clause 3

Section 2, Clause 3. Apportionment of Representatives and Taxes

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

---

42 U.S.C. § 1973.

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

---

42 U.S.C. § 1973c.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section

1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting, different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*,

That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Nos. 95-1425 & 95-1460

Supreme Court, U.S.
FILED
APR 10 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

LUCIOUS ABRAMS, JR., et al., and
THE UNITED STATES OF AMERICA,

Appellants,

v.

ZELL MILLER, et al.,

Appellees,

and

DAVIDA JOHNSON, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia

MOTION TO AFFIRM

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25 pp

QUESTIONS PRESENTED

1. Whether the District Court abused its discretion in adopting a remedial congressional redistricting plan, after the General Assembly failed to adopt a new plan, in light of the Court's findings that the old plan was fraught with constitutional defects?

2. Whether the Voting Rights Act mandated that Georgia have two majority-minority congressional districts?

3. Whether the District Court's plan adequately satisfied one-person/one-vote requirements?

PARTIES TO THE PROCEEDING

The instant movants are the Governor of the State of Georgia, Zell Miller; Lieutenant Governor of the State of Georgia, Pierre Howard; and the Secretary of State of the State of Georgia, Lewis Massey. These individuals were defendants below, and they are appellees here. Other appellees include the plaintiffs below, Davida Johnson, Pam Burke, Henry Zittrouer, George L. DeLoach, George Seaton, James Rhodes, Gary Heard, Daniel Moorel, and Donald Shirah. Appellants in Case No. 95-1425 were intervenor/defendants below, and they are Lucious Abrams, Jr., Rev. G. L. Avery, William Gary Chambers, Sr., and Karen Watson. In Case No. 95-1460, the appellant United States of America was an intervenor/defendant below.

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MOTION TO AFFIRM

Movants are Georgia's Governor, Lieutenant Governor, and the Secretary of State – Zell Miller, Pierre Howard, and Lewis Massey, respectively. They were defendants below, and they are appellees here. They respectfully move this Court to affirm the order and judgment of the three-judge District Court in this case.

Movants submit that this case is an appropriate one for summary affirmance because the appellants in both Case No. 95-1425 and Case No. 95-1460 have failed to show that the District Court acted erroneously or abused its discretion. Appellants' jurisdictional statements do not even attempt to show that the District Court acted erroneously *based on the evidence that was before it*. Rather, appellants' contentions – and even their statement of the case – rely on a supposed version of the facts that they have alleged for several years, but which were not found by the Court and which were unsupported by the evidence. Appellants' jurisdictional statements also rely upon legal theories unsupported by the decisions of any court, including theories which reasonably cannot be maintained in light of this Court's original decision in this case, *Miller v. Johnson*, 132 L.Ed.2d 762 (1995).

STATEMENT OF THE CASE

Plaintiffs filed their complaint challenging Georgia's eleventh congressional district on *Shaw* grounds on January 13, 1994. The trial on the merits of their complaint was held July 21-28, 1994, and the District Court entered judgment in favor of the plaintiffs on September 12, 1994.

That decision was affirmed in all regards by this Court in *Miller v. Johnson, supra*.

Promptly after this Court's decision, the Governor called a Special Session of the Georgia General Assembly in an effort to adopt remedial legislation. Pursuant to the Governor's call, the General Assembly met from August 14, 1995 to September 12, 1995. The charge to the General Assembly was limited to reapportionment. Because Georgia's House and Senate plans were drawn under the same constraints and with the same purposes as was the State's congressional plan, which had been held unconstitutional in *Miller*, the General Assembly undertook to reapportion the State House and Senate as well as Georgia's congressional districts.

New House and Senate plans were, in fact, adopted at the Special Session and signed into law by the Governor. The Georgia House and Senate were unable to agree, however, on a new congressional reapportionment plan. The State advised the District Court of its deadlock, and the Court then proceeded to conduct a remedial hearing and fashion a remedial congressional plan.

The *Johnson* plaintiffs also expanded their challenge, after this Court's *Miller* decision, to include Georgia's second congressional district. That district suffered the same ACLU-DOJ dictated origins as did the eleventh congressional district that was struck down in *Miller*. The District Court determined that the second congressional district was also unconstitutional, a finding unopposed

by the Department of Justice.[1] In finding the second district unconstitutional, the District Court had before it extensive factual stipulations of the parties, as well as the pertinent findings from its earlier trial regarding the eleventh congressional district. (U.S. J.S. 32a) Based on all of the evidence, the Court found as follows:

> After a trial on the merits and in the light of *Miller v. Johnson*, 115 S.Ct. 2475 (1995), we find and conclude, that race, namely, the intention to create a congressional district in which black persons would be a majority of the voting age population, was the overriding and predominant factor motivating the placement of the second district's boundaries. We find that the boundary line for the district was consistently drawn to keep potential black voters in the district and to keep potential white voters out of the district. The district was drawn to segregate voters according to their race; so, it is an unlawful district.
>
> Twelve of the second congressional district's thirty-five counties were split, and to draw the second congressional district as it is now also required the splitting of twenty-eight precincts. In addition, the boundary of the second district splits the cities of Columbus, Macon, Albany, Manchester, Roberta, Byron, Centerville, Warner Robins, Ft. Valley, Perry, Cordele, Leesburg, Moultree, and Valdosta.

---

[1] None of the private intervenor-defendants lived in the second district, and they thus lacked standing to participate in the District Court's determination of that issue under this Court's *Hays v. Louisiana*, 132 L.Ed.2d 635 (1995) decision.

Before 1992, the second district included no portions of the City of Columbus or portions of the City of Macon. Before 1992, the second congressional district contained no split counties.

We find that the sole reason for splitting precincts was racial and that the predominant reason for splitting the counties and cities was racial as well.

Georgia's second district makes use of narrow land bridges to connect parts of the district and involves a number of irregular appendages. These features affect the district's compactness adversely and, in some instances, make parts of the district only barely contiguous. We find that the predominant reason for these irregular lines is race; most can be explained on no other basis.

Linda Meggers, Director of Reapportionment Services for the Georgia General Assembly, was qualified as an expert witness. She testified that it was not feasible to create a majority-minority district in the second congressional district without including the black population centers in Columbus and Muscogee County, Albany and Dougherty County, and Macon and Bibb County. She further testified that, in drawing the second congressional district, she – we find her to have been the chief draftsperson for the District – followed the "Max-Black Plan," as espoused by the ACLU, to the same degree to which she followed it in drawing the eleventh congressional district. The Max-Black Plan's purpose was to maximize black voting strength in certain congressional districts by making the racial composition of those districts the overriding consideration in their design. . . .

> A comparison of maps depicting the second district's twelve split counties with maps showing the concentration of black residents in the same counties proves that the drawing of Georgia's second congressional district was motivated predominantly by racial considerations. Put differently, the line was drawn to put black voters in the second district and to keep white voters out. (U.S. J.S. 33a-35a) (footnotes omitted)

In conclusion, the District Court held that, while the second district differed in some respects from the eleventh, those differences were "not significant enough to make the second district constitutional." (U.S. J.S. 36a)

> Nothing in the State's argument changes the fact that the General Assembly was predominantly motivated by race in its drawing of the second congressional district. The sections of the district's boundary that were drawn for racial reasons are substantial in terms of both distance and population affected. . . .
>
> Because race was the overriding and a predominantly motivated factor in designing the second congressional district, the District can be upheld only if it survives strict scrutiny. (U.S. J.S. 37a)

The trial court found there was no compelling justification for the race-based districting presented by the second district, just as it, and this Court, had found to be the case with the eleventh district.

It was in this context that the District Court was required to impose a congressional reapportionment remedy. The State's existing plan had not been held unconstitutional in just one or two small respects. Rather, two

of the State's eleven districts had been invalidated, and they had been *completely* invalidated as being race-based. Furthermore, because the second district was located in south-west Georgia and the eleventh district was located in east-central Georgia, the Court was necessarily faced with the task of fashioning a remedy to an existing plan that involved unconstitutional district lines that literally were located across the entire State.

ARGUMENT

I. APPELLANTS HAVE FAILED TO SHOW THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN FASHIONING A REMEDY THAT SIGNIFICANTLY CHANGED GEORGIA'S UNCONSTITUTIONAL PLAN.

Appellants complain that the extent of change reflected by the District Court's remedy, when the new plan is compared to the original plan, exceeds the limits permitted a court in equity. But in advancing this argument, appellants cannot cite a shred of evidence in their support. Neither do they point to any way in which the District Court might have been clearly erroneous in its findings. Rather, they simply make the bald assumption that any plan that contains significant changes from the old plan – the *unconstitutional* old plan – must automatically fail to be a "minimum change" plan and must therefore violate the constraints of *Upham v. Seamon*, 456 U.S. 37 (1982), *White v. Weiser*, 412 U.S. 783 (1973), and other such cases. Appellants' assumption is seriously misplaced.

The eleventh congressional district contained parts of three major urban counties: Chatham, Richmond and DeKalb. The great bulk of the population of the district came from these three counties. Each of them was split, more or less along racial lines, because of the kind of racial considerations that this Court found unconstitutional.

This Court has always held that a court-ordered remedy must be sufficiently broad to fully eradicate the underlying constitutional violation. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977); *Swann v. Charlotte-Mecklenburg Board of Ed.*, 402 U.S. 1 (1971). In applying this Court's mandate, the District Court eliminated those aspects of the eleventh district that were determined to be based predominantly on race. Because race had been found to be the overall driving force in the eleventh congressional district – dictating its broad architecture as well as individual county splits – and because the three major population areas in the district had been split on the basis of race, any remedial plan that eliminated these constitutional violations would necessarily look quite different than the old plan. This the appellants ignore.

Moreover, while the remedy necessitated by the eleventh district alone would be extensive, the Court's remedy also had to address the unconstitutional second congressional district. As the trial court held:

> After a trial on the merits and in the light of *Miller v. Johnson*, 115 S.Ct. 2475 (1995), we find and conclude, that race, namely, the intention to create a congressional district in which black persons would be a majority of the voting age

> population, was the overriding and predominant factor motivating the placement of the second district's boundaries. We find that the boundary line for the district was consistently drawn to keep potential black voters in the district and to keep potential white voters out of the district. The district was drawn to segregate voters according to their race; so, it is an unlawful district. (U.S. J.S. 31a) (footnote omitted)

The remedy for the second congressional district, too, necessitated significant changes in Georgia's congressional plan. Twelve separate counties in the second congressional district were split. It is undisputed that they were all split on the basis of race. These race-based splits involved every significant city in the second district. Indeed, the boundary of the district weaved in and out of counties in order to pick up even relatively minor black populations in small towns, all for the purpose of trying to increase the black percentage in the district. (U.S. J.S. 33a-35a)

In devising a remedy for the eleventh and second congressional districts, the District Court eschewed race-based splitting of counties. In so doing, the remedial plan necessarily differed in appearance from what had been forced upon the State of Georgia by the Department of Justice during the Section 5 process in 1991 and 1992. If the Constitution prohibits splitting counties based on race, there was simply little left of either the second or eleventh congressional districts upon which to base a remedial plan. The rule of *Upham v. Seamon* thus had little practical impact in conforming the remedial plan to the original one. There was little left to serve as the core of districts that the Court could use in fashioning a remedy.

The constitutional violations were too pervasive. Appellants ignore these facts.

Appellants also ignore the fact that the *Upham* rule does not fit the circumstances of this case as it did the original Texas litigation where the case arose. That is true because the plan adopted by the Georgia General Assembly, which was struck down, did not express the policy choices of the State. Rather, that plan had been found by both the District Court and this Court to have been dictated largely by the DOJ's Section 5 unit. The plan more reflected the policy choices of the DOJ and the ACLU representatives who worked with the federal government than it did Georgia's legislators. Based on all of the evidence before it, the District Court concluded:

> At first glance it appears that, in remedying Georgia's constitutionally infirm congressional districting plan, we are faced with the same task as the *Upham* court, which would entail making only those changes necessary to bring the current plan into constitutional compliance. However, this Court's remedial task differs from that of the *Upham* courts because Georgia's current plan was not the product of Georgia's legislative will. Rather, the process producing Georgia's current plan was tainted by unconstitutional DOJ interference. *See Johnson* I, 864 F. Supp. at 1367-68. By virtue of its unconstitutional origin, Georgia's current congressional plan cannot form the basis for the remedy we now construct because it does not represent the goals of Georgia's historic policies nor the state legislature's true intent. (U.S. J.S. 4a)

. . . .

> . . . Using the current plan as the basis for the remedy would, in effect, validate the DOJ's constitutionally objectionable actions. Thus, we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals. (U.S. J.S. 5a)

Appellants do not challenge these findings as clearly erroneous, nor could they based on the record in this case.

Indeed, appellants' contention that the Court's remedial changes should have been more minimal ignores the fundamental premise of the finding of unconstitutionality. Georgia's two congressional districts were not invalidated because of some minor, technical deviation from a constitutional ideal. To the contrary, they were held to be unconstitutional because their *predominant purpose* was an illegal, unconstitutional one. It should be no surprise, where the fundamental purpose of a district's configuration is unconstitutional, that the remedy required would bear marked differences from the stricken plan. Any other result would, as the District Court noted, perpetuate the unconstitutional purposes.

Appellants' complaint that the District Court ignored Georgia's traditional districting principles, and thus violated *Upham*, also disregards what the District Court actually did in this case. The State's traditional districting principles were reviewed by the trial court in detail. These principles were then followed to the extent possible in fashioning the remedy. (U.S. J.S. 12a-18a)

Appellants do correctly state that they offered "remedial plans" to the District Court that would have changed the old plan less than did the Court's ultimate remedy.

But appellants completely failed to show that their plans would have remedied the constitutional defects found by the District Court and this Court. To the contrary, the remedial plans offered by appellants (and the incumbent congressional representatives, acting as amici) reflect much of the same architecture and line drawing difficulties that led to the declaration of unconstitutionality.[2]

II. THE REMEDIAL PLANS ADVOCATED BY APPELLANTS WERE NOT MANDATED BY SECTION 2 OR "VOTE DILUTION" PRINCIPLES

Appellants assert that the District Court's remedial plan "dilutes" minority voting strength. But the way appellants use the term "vote dilution" bears no relation to this Court's use of that term under Section 2 or any other law. To the contrary, appellants speak of "vote dilution" in the same way that led to the initial drawing of unconstitutional plans in Georgia. Then, the ACLU and the DOJ insisted on certain minority population percentages in various districts, and they insisted that congressional lines be drawn as necessary in order to achieve those percentages. Anything less was deemed "dilution." *Johnson v. Miller* I, 864 F.Supp. at 1361-67.

---

[2] Appellees would also note that, while the appellants assert that the District Court disregarded the legislature's earlier actions in 1991 and 1992, the facts are to the contrary. The District Court expressly found that it was following those plans, where possible, and where legislative choices could be separated from the unconstitutional purposes dictated by the Department of Justice. (U.S. J.S. 13a & note 9) Once again, appellees would note that no clearly erroneous challenge has been made to this finding.

Appellants' argument remains the same today. They assume, for example, that there must have been "vote dilution" because two of the three majority black congressional districts have been eliminated by the District Court's remedial plan. In so arguing, however, appellants ignore a fundamental problem: those districts originally arose solely by virtue of race-based line drawing. Their demise upon the adoption of a constitutional remedial plan should be no surprise.

Had it been possible to draw another reasonable, compact majority-minority district, the District Court was inclined to do so. The trial court found that no such compact black-majority district could be reasonably drawn, however, and that is why there is none.

> Ample evidence has been presented during the two trials to enable the Court to determine that Section 2 does not require creation of a second majority-minority district in Georgia – due primarily to the geographic dispersion of its minority population and lack of any significant vote polarization. Creating a second majority-minority district would also violate the Supreme Court mandate under which we now operate because *Johnson* II held that the VRA cannot be applied to reach an unconstitutional result.
>
> Analysis of a racial map of Georgia reveals that the state's minority population is widely dispersed. In fashioning a remedy, we considered the possibility of creating a second majority-minority district and concluded that to do so would require us to subordinate Georgia's traditional districting policies and consider race predominantly, to the exclusion of both constitutional norms and common sense. Such a

> plan would directly contravene the Supreme Court's holding in *Johnson* II – that race cannot predominate in the redistricting context absent a compelling justification for it. 132 L.Ed.2d at 782. Nonracial factors do not support creation of a second majority-minority district largely because Georgia's minority population is not geographically compact. *DeGrandy*, 114 S.Ct. at 2655. Creating a second majority-minority district would require this Court to engage in the unconstitutional racial gerrymandering characteristic of the plan we now replace. (U.S. J.S. 20a-21a) (footnote omitted).

What the Court did in fashioning its remedy here was not "vote dilution," as a matter of law, as that term has been explicated by any Justice of this Court in any prior case. See, e.g., *Johnson v. DeGrandy*, 129 L.Ed.2d 775 (1994); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Finally, in making their claim of vote dilution, the Abrams appellants argue that they were not allowed a hearing on their dilution claim. (Abrams J.S. 22) That contention is incorrect. As a matter of fact, the Court allowed all parties – including the intervenor-appellants – a full hearing on the issue of remedy. That hearing took place October 30-31, 1995. There were no restrictions placed on the evidence or arguments one could offer at that time.[3] If intervenors claimed that Section 2 vote

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[3] One witness was excluded when offered on behalf of certain amici who had been invited to participate because that witness had not been previously identified. In fact, he was substituted at the last minute for another witness who had been impeached during his pre-hearing deposition.

dilution principles demanded that a certain kind of reapportionment plan be adopted, their opportunity to present evidence to that effect was at that time (as well as at the merits trial itself). Their failure to present such evidence is their failure, not the Court's "refusal" to hear them. As the Court's order expressly notes, appellants did advance these claims at the remedy hearing. They were simply rejected, based on the evidence.

> During the remedy phase of the hearing, a significant portion of the argument centered on whether the Court's remedy would be required by Section 2 to contain two majority-minority districts. We have considered Section 2 and the case law construing it, and we conclude that two majority-minority districts are not required by Section 2 because including two such districts would violate *Johnson* II's principles. (U.S. J.S. 19a)

III. THE DISTRICT COURT'S REMEDY WAS NEITHER RETROGRESSIVE NOR VIOLATIVE OF SECTION 5 OF THE VOTING RIGHTS ACT.

The Abrams appellants contend that the District Court's remedial plan is "retrogressive" and that it violates Section 5. (Abrams J.S. 19-20) Putting aside the question of whether a Court-ordered plan is even subject to Section 5 retrogression considerations, *Connor v. Johnson*, 402 U.S. 690, 691 (1971), appellants' contention is misplaced. They make two arguments. First, they claim that, since the ten member reapportionment plan for Georgia under the 1980 census contained one black majority district out of ten, a new plan could never have

less than ten percent majority black districts. Since the Court's plan has one majority-minority district out of eleven, that being nine percent, appellants contend that the plan is fatally retrogressive. Alternatively, they argue that the "benchmark" for Section 5 should be the initial eleven district plan that contained two majority black districts that the General Assembly enacted in 1991. This plan was the one that never went into effect because of DOJ objections pursuant to Section 5.

At the outset, appellants appear to concede at least one obvious point, that the 1992 plan that has been held unconstitutional – and which contained three majority black districts – is not an appropriate Section 5 benchmark. Since that plan is illegal, and since the number of black districts was a direct product of the unconstitutional conduct of the DOJ, this should be obvious. But for the same reason, any use of the 1991 plan must fail. The majority black eleventh congressional district in that plan suffered the same infirmity as the final 1992 plan. Moreover, since the plan never went into effect because of the Section 5 objection, it was never "legally enforceable" and could not constitute a benchmark under the DOJ's Section 5 regulations. See 28 C.F.R. § 51.54(b)(1) and Order at U.S. J.S. 27a & note 20.

To argue that the "ten percent" 1982 plan created a benchmark that was violated here would be to put form far above substance. While it is true that Georgia's population did increase sufficiently to allow for the addition of a new congressional representative, it was hardly "retrogressive" to devise a new plan that continued to have one majority-minority congressional district in the delegation.

Moreover, appellants' assumption that the Section 5 benchmark standard imposes an iron-clad, impenetrable barrier is misplaced. Because the District Court found that no additional majority-minority congressional districts could be drawn that were reasonably compact, and none could be drawn without unconstitutional gerrymandering as a result, Section 5 could not possibly mandate the drawing of such a district. See, e.g., *City of Richmond v. United States*, 422 U.S. 358 (1975) (holding that even a retrogressive change is permissible under Section 5 if there are good governmental reasons warranting the change). To suggest that Section 5's retrogression standard demands that a State engage in unconstitutional redistricting is a contention without merit. To so construe Section 5 would render it unconstitutional.

IV. THE DISTRICT COURT'S PLAN SATISFIES ONE PERSON/ONE VOTE REQUIREMENTS.

Appellants assert that the lower Court's remedial plan violates one person, one vote principles. This contention is frivolous.

First, the population deviation among the districts is *de minimis*. The plan "has an overall population deviation of .35%, and an average deviation of .11%." (U.S. J.S. 6a) This extremely small deviation was justified "by the Court's adherence to Georgia's traditional districting principles and [other] unique factors. . . . " (U.S. J.S. 8a) For example, any further lowering of the population deviation would have required splitting political subdivisions that have historically been intact. There are sound,

nonracial reasons for keeping those jurisdictions together. (U.S. J.S. 9a-12a)

Appellants assert that another plan with a lower overall deviation (0.19%) was offered by the Department of Justice, and the Abrams appellants contend that "given modern computer technology, there is no reason why there should be any deviation in a court ordered congressional redistricting plan." (Abrams J.S. 24) Appellants' assertions ignore the facts of the case, the law, and common sense.

The District Court explicitly found that no other plan presented to it – *that was constitutional* – had a lower population deviation. That includes, of course, the plan offered by the Department of Justice, which for the most part sought just to perpetuate the existing unconstitutional districts. As the Court found:

> The resultant remedy contains a lower deviation than the current Georgia plan, the 1982 plan, and any other plan presented to the Court which was not otherwise constitutionally defective. (U.S. J.S. 7a-8a)

The Court specifically addressed the DOJ plan, stating:

> The DOJ presented a plan containing a slightly lower overall deviation than the Court's plan. However, its plan split numerous counties outside of the metropolitan Atlanta area, apparently for racial reasons. (U.S. J.S. 8a, note 4)

In truth, the District Court made extensive efforts to balance the populations of the districts as precisely as could be expected, consistent with some degree of deference to local governmental and electoral considerations.

No case supports the appellants' assertion that the district lines here might be unconstitutional because of population deviations.

Indeed, common sense surely must preclude the appellants' argument on this point. We are now closer to the census for the year 2000 than we are to the 1990 census. Without doubt, there have been substantial population changes over the past six years throughout Georgia. Georgia is one of the fastest growing states in the country, with its growth being especially rapid in the metropolitan areas. Even exact mathematical precision in a reapportionment plan based on the 1990 census necessarily must have significant current deviations *today*, in some cases surely surpassing ten percent. Under these circumstances, in between censuses as we are, it would be absurd to criticize a District Court's plan that had a total population deviation of .35% because "modern computer technology" could reduce the number further. Modern computer technology cannot, in fact, make the number any lower, as a practical matter, because it cannot account in any way for the tremendous population changes that have occurred since 1990, and which are continuing to occur today.

V. THE UNITED STATES' ARGUMENT THAT A NEW REAPPORTIONMENT PLAN SHOULD BE PUT INTO EFFECT FOR THE 1996 ELECTIONS IS IRRESPONSIBLE.

Appellant United States contends in its jurisdictional statement that a summary reversal may be appropriate in this case with this Court directing the District Court to

"put in place a new plan . . . that contains two compact majority-minority districts." (U.S. J.S. 27) Incredibly, the United States further contends that this should be done before the 1996 elections, while recognizing that the political process is well under way, that qualifying is scheduled to begin in approximately a week, and that elections would have to be postponed if the requested relief were granted. (U.S. J.S. 26) None of the United States' extraordinary request for such immediate relief need be reached, of course, since appellants' contentions on the merits are seriously misplaced.

Furthermore, appellees must point out that – even if there were some merit to the appellant's basic contentions – its request for such emergency relief is irresponsible. For example, the *United States fails to mention that it waited until the very end of the appeals period in which to file its jurisdictional statement.* The United States also fails to mention that it made no request by way of motion to this Court for a stay or an injunction pending appeal prior to filing its jurisdictional statement. Abrams appellants did make such a motion. It was opposed by the present appellees, and that motion was denied by the Supreme Court on February 6, 1996. See *Abrams v. Johnson*, App. No. A-624, 133 L.Ed.2d 833 (1996).

It is little less than shocking that the Solicitor General would request that this Court impose on a State such radical and disruptive relief at the very last minute in its election cycle, when the United States itself has been so unjustifiably dilatory.

CONCLUSION

For the foregoing reasons, movants Miller, Howard, and Massey respectfully request that the judgment of the District Court be summarily affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 12 1996
CLERK

(3) (3)

Nos. 95-1425; 95-1460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LUCIOUS ABRAMS, JR., *et al.*, and
THE UNITED STATES OF AMERICA,
Appellants-Intervenors,

v.

DAVIDA JOHNSON, *et al.*,
Appellees.

On Appeal from a Three Judge Panel of the United States District Court for the Southern District of Georgia

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MOTION TO AFFIRM

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37 pp

QUESTIONS PRESENTED

I. Whether the district court's fact findings, upon which the challenged districting plan is based, are reviewed under the clearly erroneous standard?

II. Whether the district court's plan comports with Georgia's traditional districting principles and this Court's holding in *Upham v. Seamon*, 456 U.S. 37 (1982)?

III. Whether the district court's plan complies with Section 2 of the Voting Rights Act?

IV. Whether the district court's plan is retrogressive?

V. Whether the district court's plan complies with the one person one vote standard?

VI. Whether the evidentiary hearing on remedy afforded Appellants fair opportunity to articulate what legal obligations they believe the Voting Rights Act imposes on a remedial districting plan?

VII. Whether the Abrams Appellants have abandoned their appeal from the district court's Order limiting their intervention in the Second District litigation?

PARTIES TO THE PROCEEDINGS

The movants, Plaintiffs below and Appellees in both case nos. 95-1425 and 95-1460 are Davida Johnson, Pam Burke, Henry Zittrouer, George L. DeLoach, George Seaton, James Rhodes, Gary Heard, Daniel Morrell and Donald Shirah. The movants on behalf of the State of Georgia, Defendants below and Appellees in this Court, are Governor Zell Miller, Lt. Governor Pierre Howard and Secretary of State Lewis Massey in both cases no. 95-1425 and 95-1460. Appellants in case no. 95-1425 are Lucious Abrams, Jr., Rev. G. L. Avery, William Gary Chambers, Sr. and Karen Watson. In case no. 95-1460, the Appellant and Defendant-Intervenor below is the United States of America.

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MOTION TO AFFIRM

Pursuant to Rule 18.6, Appellees move this Court to affirm the Orders and Judgement of the district court which provided Georgia a constitutional congressional redistricting plan that remedied the racial gerrymandering found to exist in the preexisting plan.[1]

INTRODUCTION

At the root of both appeals[2] is Appellants' wish that Georgia have two majority minority congressional districts. But, neither Appellant disputes the fact that two of the three such districts created in 1992 by DOJ fiat are unconstitutional due to racial gerrymandering. The unconstitutional districts cannot remain majority minority without race being the predominant factor governing their design.

The Court should summarily affirm the judgment below and reject Appellants' efforts to compel the district court to create a second majority minority district where it correctly found one was not required by the Voting Rights Act [hereinafter VRA]. The district court properly characterized its role as that of a "caretaker" charged with fashioning a remedial plan [hereinafter the Plan][3] that cured the constitutional defects by employ-

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[1] *Johnson v. Miller*, 684 F.Supp. 1329 (S.D. Ga. 1994), *aff'd*, —— U.S. ——, 115 S.Ct. 2574 (1995) (Eleventh District held unconstitutional). Following remand, the court found the Second Congressional District unconstitutional, a finding the Appellant United States [hereinafter DOJ] conceded to be correct. No appeal was filed. U.S. Jurisdictional Statement App. 31a *et seq.*

[2] The Abrams Intervenors [hereinafter ACLU] appeal is No. 95-1425. The DOJ, another intervenor below, has filed its own appeal, No. 95-1460.

[3] Integral to a full and fair remedy is maximizing the time between implementation of the Plan and qualification of candidates beginning on April 22, 1996. The court's repair of the wholesale racial gerrymandering that permeated the 1992 plan will not instantly remedy all of the adverse side effects this kind of discrimi-

ing traditional districting principles that steered clear of the larger political questions. ACLU Jurisdictional Statement [hereinafter J.S.], App. 29. That is the correct approach.

Contrary to Appellants' claim that the Plan does not correctly reflect state legislative policy, Georgia did not appeal. Instead, it successfully opposed the ACLU's motion to stay implementation of the Plan. The State believes the Plan comports with traditional districting principles, accurately reflects legislative policy, and should not be disturbed on appeal.

For the DOJ to ask this Court to summarily halt the 1996 congressional election cycle with qualifying ten days away, and have yet another DOJ drawn plan imposed on Georgia, is irresponsible, particularly in light of the fact the DOJ never filed a motion for stay in December of 1995 when the Plan was implemented.

STATEMENT OF THE CASE

The Georgia General Assembly was called into Special Session to fashion a remedy following this Court's decision in *Miller v. Johnson*, —— U.S. ——, 115 S.Ct. 2475 (1995). It could not agree on a plan which maintained either the Eleventh or Second District as a majority district, because it would require the State to engage in racial gerrymandering. The legislature adjourned without enacting a remedial plan, forcing the district court to draw the Plan.

If one reads Appellants' Jurisdictional Statements without looking at the Plan, one would expect the Plan to be markedly different than the 1992 Plan. In truth, there is minimum change to the majority of the districts. Districts 5, 6, 7 and 9 have little or no change. All parties agreed on the reconfiguration of District 1. The 8th District is not significantly changed. The Second District is returned to its 1982 core. The Fourth District is now sited in a reunified DeKalb County and the Tenth District mirrors its 1982 form. The Eleventh District is new, as it should be since it was added after the 1990 census. It tracks the growth counties north of Atlanta along I-85. It is the only district in the Plan Appellants seriously challenge.

nation causes a democracy. However, the Plan has been in place since December 13, 1995. This has afforded Georgians four months to begin the process of getting the new boundaries publicized, voters sensitized, candidates mobilized and the power of incumbency, where wrongfully gained, deemphasized. All that takes time, and the remedial Plan is now at work doing just that.

1. The Unconstitutional Districts

Appellants want one thing: two majority minority districts. Yet, the district court's findings of fact preclude their request:

> "Ample evidence has been presented during the two trials to enable the court to determine that Section 2 does not require creation of a second majority minority district in Georgia—due primarily to the geographic dispersion of its minority population and lack of any significant vote polarization. Creating a second majority minority district would also violate the Supreme Court mandate under which we now operate because *Johnson II* held that the VRA cannot be applied to reach an unconstitutional result." (ACLU J.S., App. 20-21)

District Eleven was the new district in 1988 with no traditional economic base or geographic core to govern its placement. It did not suffer from a few easily reversible incidents of gerrymandering. Every aspect of the district was race driven.[4]

[4] When Lt. Governor Howard was asked what part of the Eleventh District was racially gerrymandered, he was forthright in his reply: "Well, basically the whole district." *Miller v. Johnson*, (Tr. IV, p. 208). Howard went on to detail a racial reason for inclusion of virtually every county in the district. The district's counties were selected "for the purpose of achieving a certain . . . racial composition of the district. I think that's obvious. I don't think anybody disagrees with that. . . . We're trying to achieve a certain VAP in a certain population. Why else would you draw lines like that?" *Id.*

This Court held there was no cognizable community of interest to justify the district:

> "Nor can the State's districting legislation be rescued by mere recitation of purported communities of interest. The evidence was compelling that there are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District." 864 F.Supp. at 1389-90, 115 S.Ct. at 2490.

The starting point on remedy was rejection of the old serpentine Eleventh as the framework. The district court began by identifying the district's core in DeKalb County,[5] and in reuniting that county because the population of DeKalb is roughly equal to a congressional district. This approach advanced a number of traditional districting principles. It reunited DeKalb County (except for that small portion that is also part of the City of Atlanta which was kept intact in the Fifth District). It created an extremely compact district involving just two metro counties. It was also a means of insuring this district was a strong minority influence district,[6] destined to become Georgia's second majority minority district by the year 2000.

Consolidating the district in DeKalb was also dictated by the fact the metro area was where the State's minority population increased between 1980-1990. It was therefore logical and nondiscriminatory to incorporate that core into a district sited in metro Atlanta. Crafting the remedy in this fashion gave the district the synergy of an urban/suburban economic orientation, located it in the number

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[5] South DeKalb made up 35.3% of the District's total population. (*Pl. Exh.* 24). When the appendages in Chatham, Richmond, Wilkes and Twiggs County are removed, DeKalb represented over 60% of the remaining population.

[6] The district court found a ". . . demographic trend indicating DeKalb County's population, which comprises the majority of the remedy's Fourth District, has the potential to become a very strong minority influence district or a majority minority district as Georgia is reapportioned following future censuses, if it is not already." ACLU J.S. App. 24, n.17. DeKalb's black registered voters totalled 39.4% in 1995. *Id.*

one minority growth area in the State, while minimizing intrusion into the traditional cores of the other ten (10) districts. The new Fourth is the remedial district for the old Eleventh in the court's plan.

The district court's proper respect for the 1982 cores of the original ten districts dictated that the Tenth District be returned to its traditional east central Georgia location. Once that was done, the new Eleventh District formed quite naturally into an extremely compact north central district with a metro Atlanta foundation. This presented the least disruptive approach to incorporating a new district into Georgia's Congressional Plan.

District Two was the most intensely gerrymandered district in the 1992 plan.[7] The DOJ forced the State to pull over 200,000 predominately black urban voters from twelve different counties divided on purely racial lines and include them in the district, negating its rural and agricultural focus. Many were included via the "Macon-Savannah trade",[8] which effectively split the core of the Eighth District (Macon/Bibb County), into racial enclaves. Bibb's black citizens were relocated to the Second District for purely racial reasons. Any remedy of the unconstitutional racial gerrymander of Bibb County required it be returned to the Eighth District.

Muscogee County was also gerrymandered.[9] The remedial plan properly reunites Muscogee County and returns it to its traditional home, the Third District.

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[7] *See* Pl. Trial Exh. 29-40 and Pl. Exh. 1-23 submitted with Plaintiffs' Motion for Summary Judgment.

[8] *Miller v. Johnson*, 115 S.Ct. at 2484.

[9] No party disputed the fact that the divided rural counties and cities along the boundaries of the Second District had to be made whole. Even with these changes, the Second District in the remedial plan still remains a strong minority influence district with a black population of 39.21%. The DOJ's proposed district is 42% black but racially gerrymanders Muscogee County in the same manner that the district court found to be unconstitutional.

2. Appellants' Alternative Plans

The Appellants' approach to remedy is premised on two fundamentally flawed assumptions: (1) that the 1992 plan reflected the true will of the Georgia legislature; and (2) that unconstitutional districts are entitled to deference. If the 1992 plan is accorded such deference, then Appellants' objective of having racial enclaves instead of districts will permeate any remedial plan.

The ACLU plans retain the Macon portion of the unconstitutional "Macon-Savannah" trade. Apparently, the ACLU considers only the Savannah side of the trade unconstitutional. When faced with correcting the gerrymander of Muscogee County, the ACLU simply ignored the problem; a gerrymandered Muscogee and Bibb County are essential to the ACLU's race driven goal of maintaining the Second District's black population.[10]

The ACLU's "new" Eleventh is a noncompact race driven assemblage because there is no compact minority population present. Like the old Eleventh, the ACLU's plan is founded on the racial gerrymander of DeKalb County. In fact, the DeKalb portion in one ACLU version of the Eleventh (Plan "C") captured *83% (212.650) of DeKalb's entire black population (230,425)* via gerrymandering. This statistic should put an abrupt end to any further consideration of such a race driven alternative.

A visual comparison of the ACLU version of the Eleventh and the existing unconstitutional Eleventh underscores the point. The ACLU incorporates almost the full length of the former Eleventh and is relatively the same size, if not slightly larger in square miles. The ACLU's modus operandi is transparent. The original land bridge through Henry County is relocated to Rockdale and Newton counties. While both are predominantly white counties, they are lightly populated and form a "whole county" land bridge to get to Jasper County, the gateway to the

[10] Using 1994 population figures, the Plan maintained the Second District as a *third* majority minority district.

sparsely populated rural east central counties whose black population makes them so desirable to Max-Black proponents.

Compactness is a defining traditional districting principle because it best interacts with the objectives of preserving the geographic cores and the economic orientations of existing districts to create functional districts. Yet, Appellants' versions of the Eleventh take it from south DeKalb all the way to South Carolina when a single metro county (DeKalb) provides almost enough population to locate the district in a single county. The VRA does not require Georgia to travel 200 miles via a land bridge composed of Rockdale and Newton counties for the sole purpose of tying *sixteen* distant rural counties,[11] whose total population is only 176,358 (with 95,010 being black), to a gerrymandered south DeKalb County. Appellants offer one rationale: "minimal disruption" of an unconstitutional district. It is a nonsequitur. If compactness is to have any meaning, this kind of race-based districting must be rejected.

(a) *Incumbents*: With the core of the old Eleventh now in the Fourth District, the Eleventh District incumbent, Cynthia McKinney, has already announced her intent to seek reelection in the Fourth since her home county is DeKalb. Rep. McKinney has publicly referred to her reconfigured district as a "rainbow" of diversity.[12] As noted

[11] The counties, with the total population and black population percentage are Morgan (12,883; 34.6%), Jasper (8,453; 34.8%), Greene (11,793; 50%), Putnam (14,137; 33.6%), Taliaferro (1,915; 61%), Hancock (8,908; 79.4%), Baldwin (39,530; 42.3%), Wilkinson (10,228; 42.1%), Warren (6,078; 60.2%), Glascock (2,357; 12.6%), Washington (19,112; 51.7%), Johnson (8,329; 34.1%), Jefferson (17,408; 55.7%), Burke (20,579; 52.3%), Jenkins (8,247; 41.4%, and Screven (13,842; 45%).

[12] Ms. McKinney stated she was confident of reelection in a district dominated by her South DeKalb home: "There will be a new opportunity to form a real rainbow coalition because DeKalb County is a rainbow." McKinney Say's She'll Run, *The Atlanta Journal Constitutional*, December 17, 1995, Section G, page 1.

by the district court, DeKalb has a black population, using 1995 voting registration figures, of almost 40% [13] and a rapidly growing non-black minority population as well. White voters are a minority in DeKalb County.

The incumbent in the Fourth District, John Linder, is running for reelection in the renumbered Eleventh, which contains the core of his former Fourth District.[14] The Second District incumbent, Sanford Bishop, is also seeking reelection in his district. To date, no incumbents are running against each other.

(b) *Lack of a Compact Minority Population*: The district court's decision not to fashion a second majority minority district is based on the absence of a sufficiently numerous and compact minority population to support it. As the district court held:

> "Analysis of a racial map of Georgia reveals that the state's minority population is widely dispersed. In fashioning a remedy, we considered the possibility of creating a second majority minority district and concluded that to do so would require us to subordinate Georgia's traditional districting policies and consider race predominantly, to the exclusion of both constitutional norms and common sense. Such a plan would directly contravene the Supreme Court's holding in *Johnson* II—that race cannot predominate in the redistricting context absent a compelling justification for it . . . . Nonracial factors do not support creation of a second majority minority district largely because Georgia's minority population is not geographically compact. *DeGrandy*, 114 S.Ct. at 2655. Creating a second majority minority district would require this Court to engage in the unconstitutional racial gerrymandering characteristic of the plan we now replace." ACLU J.S., pp. 21-22.

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[13] Appellants' contention that the minority voting age population in the Eleventh District was reduced "from 60.4% to 10.8%" is grossly misleading since it is the Fourth District in the remedial plan that is its counterpart, not the "new" Eleventh.

[14] *See* footnote 12 *supra*.

ARGUMENT

I. THE CLEARLY ERRONEOUS RULE IS THE GOVERNING STANDARD OF REVIEW

The issues upon which the district court's judgment on remedy turned are fact intensive. They involved an in-depth analysis of Georgia's geography, population demographics, districting history and the traditional principles and policies used to fashion federal voting districts. Paramount among the traditional districting principles adhered to was respect for existing political subdivisions, including counties, municipalities and voting precincts. Given the deference due those factual findings, summary affirmance under *Fed. R. Civ P.* 52(a) is warranted without further briefing or argument.[15]

This longstanding rule includes ultimate findings of fact in Voting Rights Act cases. *See Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). The *Gingles* Court concluded:

> "Thus, the application of the clearly erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law."

The standard is especially applicable in these types of cases because of the importance of local factors and geography in assessing whether a gerrymander has infected a districting plan. District courts possess the critical local knowledge and experience to best make the crucial factual determinations on which these cases turn.

This same reasoning must apply to the presence of a racial gerrymander because the rationale for the deference

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[15] A finding is only clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (*quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 524, 92 L.Ed.2d 746 (1948)).

—the importance of local factors—is equally applicable in both types of cases. As the Court stated in *White v. Regester*, 412 U.S. 755, 769-770, 93 S.Ct. 2332, 2341 (1973):

> "[W]e are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . district in the light of past and present reality, political and otherwise."

II. THE QUANTUM OF CHANGE EFFECTED BY THE COURT PLAN WAS NECESSARY GIVEN THE MAGNITUDE OF THE CONSTITUTIONAL INFIRMITY TO BE REMEDIED

The district court was faced with a daunting challenge on the question of remedy. Two large congressional districts involving almost one third of Georgia's 159 counties were found unconstitutional. It was not a question of malapportionment, but of racial discrimination, effectuated by bizarre geographical machinations that divided sundry cities and counties along express racial lines having no corresponding geographical counterpart. Moreover, the 1992 congressional plan was acknowledged to be more a creature of policy choices made by the DOJ than an exercise of legislative will by the General Assembly. *See* DOJ J.S. App. pp. 5-7. Thus, the district court was denied the most reliable compass used by judges in devising remedial plans.

The following criteria properly governed the district court's preparation of the remedial plan:

A. The Voting Rights Act: Any purposeful use of race as a predominant districting factor must find justification in the VRA or run afoul of the Fourteenth Amendment:

> "Any independent state interest in the remedial revision of voting laws is subsumed within [the VRA] . . . the VRA places a necessary leash on race-based remedial practices in the voting sphere. . . . The VRA ensures that states honor the right to vote; our recognition of no other compelling justification for race based [districting] ensures that states do not go too far." *Johnson v. Miller*, 864 F.Supp. at 1380, *affirmed*, 115 S.Ct. 2475 (1995).

(1) *Section 5*: Appellants contend the remedial Plan is retrogressive. Leaving aside the fact a court drawn plan is not subject to Section 5, that contention is untrue. It is well settled that the last legislatively adopted *constitutional* congressional plan is the benchmark for retrogression. The DOJ's own regulations require a retrogression analysis to proceed from the most recent *constitutional* plan in force in the jurisdiction. *See* 28 C.F.R. § 51.54 (b).[18] *See also, Holder v. Hall*, —— U.S. ——, 114 S.Ct. 2581, 2586-88 (1994). In this case, that is the 1982 plan. The State agreed the 1982 plan is the proper benchmark. (Remedy Tr., pp. 378-380); Joint Stip. No. 88. A plan with one majority minority district, like the 1982 Plan, would therefore satisfy the nonretrogression requirement of Section 5.

(2) *Section 2*: The parties in the Second District litigation on liability, which included the United States, stipulated that Section 2 required the district to be majority minority. Joint Stip. No. 91. As configured in the 1982 plan, the district had a black population of 37.27%, based on the 1990 census, and was precleared by the DOJ. It contained *no* split counties. The remedial Plan increases that percentage to 39.21%. Clearly, the Plan is not retrogressive with respect to the Second District.

The Eleventh District counterpart in the Court Plan is District 4. Appellants argue it violates Section 2, because it fails to recognize and politically empower an identifiable compact, concentrated minority-population center entitled to recognition in the context of a voting district under the three part *Gingles* test. The district court found to the contrary.

Linda Meggers, the expert this Court and the district court acknowledged as the foremost authority on Georgia

[18] 28 C.F.R. § 51.54 (1990). *See also Ketchum v. Byrne*, 740 F.2d 1398, 1402 (7th Cir. 1984).

redistricting, testified as to the efforts to create a second majority minority district during the 1995 special session:

> Meggers: . . . [L]ooking at cleaning up the Eleventh . . . the way we drew it in 1991 [the first plan] I didn't think satisfied the constitutional requirements.
>
> Question: Consistent with your understanding of . . . *Miller v. Johnson* and the [VRA, was] a second majority minority district . . . possible?
>
> Meggers: Not one that said 50 percent . . . in 1990, no sir, it was not. Remedy hearing of October 30-31, 1995, Tr. 434. (hereinafter R.Tr.).

The State Defendants' counsel agreed with Ms. Meggers:

> "We very much disagree [with the DOJ and ACLU] that Section 2 mandates there be two black majority districts. . . .". Remedy Transcript (10/31/95) [hereinafter R.Tr.] 384.

The district court also agreed. ACLU J.S. App. 21-22, quoted *supra* at p. 11.

B. Adherence to Georgia's Traditional Districting Principles: The district court heard substantial testimony with respect to the traditional districting principles that governed congressional plans before the "Max-Black" era in 1992. The district court made numerous findings as to the principles that should govern the fashioning of a remedial plan. ACLU J.S. App. pp. 12-19. They include

(1) *The Integrity of Political Subdivisions*: Unless required by the overriding principle of one person-one vote, counties and cities should not be divided, unless mandated by the VRA. No such divisions, except in the Fifth District, were required.

(2) *Respect for the Traditional Cores of Districts*: The undisputed testimony established that the traditional "overriding interest" in fashioning Georgia's congressional districts was economic. Districts that underwent racial revision in 1992 via the separation of counties from their historical economic cores were restored to their geographic

and economic cores with racially divided political subdivisions reunited.[17]

(3) *Incumbents In Racially Gerrymandered Districts Are Not Due Protection*: Apellants argue that "minimal disruption" to the unconstitutional plan means unconstitutionally elected incumbents should be protected. An unconstitutionally elected incumbent deserves no protection. This Court must not permit a race-based plan to survive strict scrutiny under the guise of "incumbency protection". As stated in *Armour v. State of Ohio*, 775 F.Supp. 1044, 1061 (N.D. Ohio 1991):

> "Although courts are reluctant to provide relief on claims that a district has been gerrymandered to protect an incumbent, this rule *does not hold* when the manipulations were conducted on a race conscious basis."

See also Ketchum v. Byrne, 740 F.2d at 1406-10; and *Garza v. Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990).

The district court properly concluded that little, if any, weight should be given to the political considerations that usually protect incumbents where their districts are unconstitutional. A constitutional remedy cannot retain vestiges of its race-based origin under the guise of protecting an unconstitutionally elected incumbent.

C. The Unconstitutional Districts Were Not Entitled to Judicial Deference: Appellants incorrectly argue that judicial deference must be shown to unconstitutional districts as they represent the last "legislative" expression of intent on the matter. Appellants so contend in order to preserve as much racial gerrymandering as this Court will sanction. That approach is wrong for several reasons:

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[17] District One (1) is the Coastal District. Savannah, its traditional core, was returned to the First. The same thing can be said for Augusta/Richmond County's role in the Tenth District, Macon/Bibb County's role in the Eighth District and Columbus/Muscogee County's role in the Third District. The district court returned all these areas to their traditional districts.

(1) *The 1992 Plan was not an act which reflected the true will of the Legislature.* Both defendants Murphy and Howard testified the General Assembly acted solely to meet the demands of the DOJ and that Georgia's legislative will was completely overridden by the desire to obtain DOJ preclearance. The State has so stipulated and the district court so held.[18]

Appellants contend the State desired two majority minority districts, as evidenced by the first plan submitted in 1991. *See* DOJ J.S. at Appendix 46a. That argument ignores the evidence, including the State's admissions as to the unconstitutionality of the first plan. The State conceded all three congressional plans offered during the submission process had, as their paramount goal, the satisfaction of DOJ demands for maximizing representation of minorities. The line drawing done to achieve that illegal goal squarely conflicts with *Miller*. R.Tr. p. 277.

The testimony of Linda Meggers, the architect of all three plans, confirmed what the State now admits and what both this Court and the district court found; i.e., that the DOJ's misguided maximization agenda infected even the first plan with an unconstitutional reliance on race:

> Meggers: To be honest . . . I was partly at fault for drawing it like we did in 1991. [It was based on] my understanding of [what] I thought the Department of Justice was going to make us do . . . [At first] none of the ways I drew it ever showed a total of a 50 percent minority population . . . At the first public hearing, we were presented . . . a map . . . that . . . drew it from South DeKalb over to Augusta and then to Macon. The initial response in our office was that's ridiculous. We don't have to draw that. . . . I was the one who said if it was there we have to draw it. It was said that it doesn't make any sense and I said maybe not, but . . . we may get into trouble with the Justice Department if we don't draw it. . . . like that and I think that was the main reason they [drew it] . . . . R.Tr. 431-432.
>
> Question: Was the portion of Bibb County that was placed in the Eleventh District . . . in the first plan the predominantly black population . . . of Macon and Bibb County?
>
> Meggers: Yes, . . . on the third try at redrawing the congressional plan Bibb County was removed from the Eleventh District and. . . . the black population previously in the Eleventh was attached to [the] Second District.
>
> Question: For what reason?
>
> Meggers: That was the one way in which we could achieve a majority black VAP in the Second . . . District.
>
> Question: So it was racially motivated?
>
> Meggers: Yes. (R.Tr. 26).

The State's counsel acknowledged the first plan was unconstitutional:

> "The overall purpose and architecture of the Eleventh that runs from DeKalb to Richmond County to Macon *in plan one was all for a racial purpose.* . . . [I]t is now a fact that the purpose of that district was borne upon a racial basis and the line drawn in that fashion for that purpose.
>
> That in and of itself makes the Eleventh District, going out through east central Georgia . . . unconstitutional." (R.Tr. p. 320).

Plan One employed the gerrymandered DeKalb-Augusta-Macon racial triangle to make the Eleventh District meet the DOJ's now infamous 65% rule.[19] *See* App. A. Substituting a gerrymandered Macon for a gerrymandered

[18] "'The Justice Department would accept nothing less than abject surrender to its maximization agenda. . . . [T]he General Assembly acquiesced and as a consequence was driven by its overriding desire to comply with the Department's maximization demands.'" *Johnson v. Miller*, 864 F.Supp. 1354, 1366 (S.D. Ga. 1994).

[19] *See, e.g., Burton v. Sheheen*, 798 F.Supp. 1329, 1354 n.45 (D.S.C. 1992), *vacated and remanded on other grounds, SRAC v. Theodore*, —— U.S. ——, 113 S.Ct. 2954 (1993).

Macon for a gerrymandered Savannah, as the DOJ does in its Illustrative Plan, does nothing for its constitutionality. Plan One was just as racially gerrymandered as the final plan, only the demography was different. Yet, Plan One is the blueprint for every "remedy" Appellants urge on this Court.

(2) *A conscious choice to segregate the races is unconstitutional, unless mandated by the Voting Rights Act.* The Second and Eleventh Districts were held unconstitutional because of the racial division of major cities and counties. The Appellants seek to camouflage the fact their plans are still predominantly based on race by contending such districts are "less bizarre" than the adjudicated districts and represent "minimal change" of those districts.[20]

The premise that correctly guided the implementation of the court's Plan was that an unconstitutional district is not entitled to deference. The district court specifically found it could not do less than it did and still remedy the unconstitutional Districts. Appellants, on the other hand, proceed from the assumption that all "non-appendage" portions of the Districts must remain intact. This notion is but a reformulation of the "bizarreness" defense to liability; i.e., that only the most bizarre aspects of the district are unconstitutional and in need of repair. This Court has rejected this defense because race-based districting is unconstitutional regardless of the geographical configuration of the district where the plan violates traditional districting principles, and is not required by the VRA.[21]

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[20] This Court has already rejected Appellants' argument that such a claim is limited to districts with "bizarre" geographical configurations. *See Shaw v. Reno*, —— U.S. ——, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Bizarreness is simply circumstantial evidence by which racial purpose can be proven. *Miller*, 115 S.Ct. at 2486-87.

[21] It would contravene fundamental principles of equity to allow an atmosphere of judicial deference to reanimate the unconstitutional districts in slightly less bizarre formats that perpetuate the government sponsored racial discrimination that rendered them unconstitutional initially.

The DOJ's continued efforts to impose its subjective vision of a racially "fair" congressional districting plan on Georgia is particularly troublesome in light of the history of this case. It was the DOJ that wrongly forced the State draw both unconstitutional districts. Now, the DOJ challenges the Court's remedy as too expansive, seemingly still unaccepting of the holding in *Miller v. Johnson, supra,* and its findings with respect to the magnitude of racial gerrymandering the DOJ infused into the 1992 plan.

The DOJ's demand that this Court intervene now and superimpose another DOJ "Plan" on Georgia in place of the court's Plan (when it was not even offered at the remedy hearing) would have several unacceptable effects:

(1) It would sanction *de facto* DOJ Section 5 review of an exempt court-drawn plan;

(2) It would perpetuate the micromanagement of Georgia's politics by the DOJ, which was clearly not the purpose or intent of Section 5 of the VRA, create considerable voter confusion and exacerbate the public's dismay and growing apathy over this entire matter;

(3) It would ignore the fact that Georgia accepts the court's Plan as fairly representing Georgia's traditional districting principles in a fashion that complies with the VRA *and* the Fourteenth Amendment;

(4) It would perpetuate and give credence to the continued efforts of the DOJ to conduct phantom Section 2 challenges to state districting plans via an overbroad and unconstitutional interpretation of Section 5, made all the more unacceptable in this case by the fact the Plan being challenged is court drawn;

(5) It would perpetuate and give credence to a definition of retrogression under Section 5 that demands more majority minority districts be automatically created with every census where population increases justify additional districts, regardless of whether dispersal of the minority population precluded creation of new majority minority districts without racial gerrymandering.

III. THE PLAN IS NOT INCONSISTENT WITH *UPHAM v. SEAMON*

The case of *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518 (1981) stands for the general proposition that courts should give deference to the *last* constitutional statement of legislative intent. However, that deference is not due where the last "statement" has been judicially determined to be (1) coerced; and (2) an unconstitutional and racially discriminatory act. As stated in *Upham*, 102 S.Ct. at 1520:

> "Although a court must defer to legislative judgments on reapportionment as much as possible, it is *forbidden* to do so when the legislative plan would not meet the special standards of . . . *racial fairness* that are applicable to court-ordered plans." [Emphasis added].

Is not racial fairness a two way street? This Court held there was no community of interest to justify the connection of south DeKalb county to the string of rural east central counties that formed the "empty rural center" of this meandering district that moved via land bridge from urban Atlanta to the South Carolina border for one purpose only: race. That finding alone threw the whole district into constitutional question.

Yet, the DOJ wants the "totality" of the Eleventh Distric maintained, replacing some appendages with a more intensely racialized division of DeKalb County and a gerrymandering Bibb County (divided between three districts) to partially compensate for the loss of other gerrymandered sources of black population. The DOJ Plan ignores the breadth of this Court's condemnation of the Eleventh District and the limitations *Upham v. Seamon, supra*, places on the judicial deference due prior legislative plans that are racially discriminatory.[22]

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[22] Through the years, the ACLU and DOJ have argued that prior legislative plans shown to be racially discriminatory should not be given deference. It would be anomalous to contend that a racially discriminatory legislative plan cannot be given deference because it violated the Voting Rights Act, but a discriminatory plan that violates the Fourteenth Amendment can be given deference where the plan only discriminates against whites.

A. Section Two of the VRA Did Not Obligate The Court To Retain The Majority Minority Status Of the Eleventh District

The court's Plan is borne out of a blending of two parallel lines of cases, one defining the limited powers of a court to redistrict where the legislature fails to properly accomplish the task, and the other line defining the court's broad equitable powers to fashion remedies to counteract racial discrimination.

Given the separation of powers upon which our government is based, the judiciary has traditionally sought to minimize its involvement in redistricting. However, that general rule must be tempered when race discrimination is the constitutional wrong at issue. In this case, the legislative will of a state has been subverted, and the redistricting process converted, into a tool for racial discrimination. The remedy cannot be hamstrung by the unconstitutional elements of the very plan it seeks to fix. A court should not be so tightly tethered by the traditional deference due the legislative branch that it cannot fashion a remedy affording full and complete relief where race discrimination is the evil to be remedied.

In measuring what deference might be due past legislative plans, the district court held that the racial discrimination infused into the 1992 congressional plan did not just impact two districts, but permeated the entire plan:

> "The *current districting plan* overstepped the requirements for Section 5 compliance because it was designed to secure *proportional representation* for black voters in Georgia, not adhere to the VRA." *Johnson v. Miller*, 864 F.Supp. at 1385. (Emphasis added).

If the line drawing that caused such wholesale segregation is not cleared away "root and branch"[23], the effects of this constitutional wrong will racialize Georgia's Congressional politics indefinitely.[24]

A court possesses broad remedial powers in remedying constitutional wrongs. *See, e.g., United States v. Paradise*, 480 U.S. 149, 183-184 (1987) ("The scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."). The *Paradise* court went on to note (in a non-redistricting context) that it does *not* require plans remedying racial discrimination ". . . be limited to the least restrictive means of implementation." *Id.*[25]

In *Freeman v. Pitts*, 503 U.S. 467, 112 S.Ct. 1430 (1992), this Court provided more insight into the scope of a court's equitable power to deal with unconstitutional racial discrimination, underscoring the breadth of discretion a court of equity possesses in dealing with a constitutional wrong like racial discrimination:

> "The essence of a Court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the condition or redress the injuries caused by unlawful action. . . . The task is to correct, by a balancing of the individual and collective interest, the condition that offends the constitution." *Id.* at 1444.

[23] *See United States v. Edgar*, 404 U.S. 1206, 92 S.Ct. 8, 9 (1971) (Justice Black stated the Fourteenth Amendment mandated that "racial discrimination . . . be eliminated root and branch.").

[24] Section 5 retrogression principles would institutionalize the racial choices made by the DOJ. To effectuate less than a full remedy creates a real potential that the gerrymandered districts will gravitate back towards racial identities that are not warranted by the presence of compact minority populations.

[25] *Accord McDaniels v. Mehfoud*, 702 F.Supp. 588 (E.D. Va. 1988). (Once a violation of VRA is noted, district court should exercise traditional equitable powers to fashion relief so it *completely* remedies prior violations and provides equal opportunity.) *See also East Jefferson Coalition v. Jefferson Pausch*, 691 F. Supp. 991 (E.D. Va. 1988).

In a variety of anti-discrimination contexts, this Court has held a court's remedial powers extend beyond elimination of the actual mechanism of discrimination when a broader remedy is necessary to remedy racial injustice. *See, e.g., Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968); *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1968). In the case of voting rights violations, Congress has squarely stated that a district court must "exercise its traditional equitable powers so that it completely remedies the prior dilution. . . ." S. Rep.No. 417, 97th Cong., 2d Sess. 31 (1982).[26] To do that, the district court restored the cores of Georgia's original districts by eliminating those boundaries that divided the population based solely on the pigments in their skin, but still retained two strong minority influence districts with the cores of the former unconstitutional districts at their foundations.

B. The ACLU's Expert Did Not Support The Contention That Section 2 Required Two Majority Minority Districts

At the evidentiary hearing on remedy, Appellants' only witness was Selwyn Carter who testified as an expert "in the field of demography and redistricting". (R.Tr. 295). He is an attorney and Director of Voting Rights Programs for the Southern Regional Council. He represented the Black Caucus in the Georgia General Assembly during the 1995 Special Session. His stated expertise is in "drafting districting plans and in assessing plans drafted by others for . . . . compliance with the Voting Rights Act." (R.Tr. 295).

Carter either prepared or supervised the preparation of every ACLU plan advocated during the remedy phase of the litigation. (R.Tr.297-298). Their principal feature

[26] *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974), also describes the broad remedial discretion vested in a district court in cases involving racial discrimination in the drawing of district lines.

was retention of majority minority status for the unconstitutional districts. Carter was asked point blank whether he believed such a configuration of the Eleventh District was mandated by the Voting Rights Act. (*See* questions posed at R.Tr.324, 326, 330, 332). He never answered this question in the affirmative. The best he could offer was to plead uncertainty:

> *Question:* . . . [I]s there . . . a single plan [offered by] ACLU, black caucus or your organization that you can say under oath is required by the Voting Rights Act in terms of a second majority minority district?
>
> *Carter:* I believe that we are in a gray area of the law. (R.Tr. 332).[27]

Carter finally admitted the ACLU's plans were based on some subjective sense of "racial fairness":

> *Question:* . . . [Y]ou told any number of people during the Special Session that to be *politically* acceptable to the black caucus there had to be a second congressional district that was majority black?[28]
>
> *Carter:* Yes, sir.
>
> *Question:* Regardless of whether it was required by the Voting Rights Act . . .?
>
> *Carter:* I do not recall making any reference to the Voting Rights Act.
>
> *Question:* But in your own mind that was the reality?
>
> *Carter:* Yes. . . . (R. Tr. 332-3).

---

[27] Carter acknowledged there were still clear cases wherein a majority minority district would be required by the Voting Rights Act (R. Tr. 333). Obviously, this was not one of them. Carter was also unable to testify regarding any community of interest that would serve as a foundation for the race based configuration of the Eleventh District advocated by Appellants. (R. Tr. 338).

[28] The ACLU alternative plans were essentially the same legislation Carter prepared for submission by the Black Caucus during the Special Session.

> *Question:* That was based on a plea of racial fairness as opposed to any legal mandate . . .?
>
> *Carter:* It was based on racial fairness . . . . (R. Tr. 330-331).

The record from the remedy hearing is similarly devoid of any analysis of voting patterns. The DOJ's "Brief on Remedy" submittted to the district court on October 27, 1995, stated that the DOJ had retained an expert to assess whether the alternative plans presented to the district court complied with the VRA. The DOJ stated, "[f]or this reason, all of the [DOJ's] observations . . . concerning [VRA] compliance are preliminary and subject to reassessment based on . . . [the experts] analysis." Brief, p. 7, n.6. No such testimony was offered leaving the DOJ without any evidentiary basis to contend that the Plan violated Seciton 2 of the VRA.

It is on this hollow evidentiary record the Appellants contend a second majority minority district was "mandated" by Section 2 of the Voting Rights Act. The argument is devoid of evidentiary substance or legal merit.

IV. THE COURT PLAN DOES NOT VIOLATE THE ONE PERSON, ONE VOTE PRINCIPLE

The court Plan achieved an overall deviation percentage below any alternative plan.[29] Yet, Appellants argue the .35% overall deviation and .11% average deviation achieved by the court Plan violated the one person, one vote principle. The argument is inconsistent with the position they took in the district court.[30]

---

[29] At the remedial hearing, the DOJ declined to offer any plan. It was three weeks later when the DOJ tendered its plan. Its late submission was objected to by all other parties, except the ACLU.

[30] The inconsistency in the ACLU's position is illustrated by the fact the plan they advocated had a deviation of .93% (R. Tr. 282-283). Every alternative plan they advanced had a deviation that greatly exceeded .35. The ACLU's deviation was triple that of the court's Plan.

ACLU Appellants' counsel admitted that Georgia's policy of maintaining the integrity of political subdivisions would justify even a .9 percent overall deviation:

> "It might well be that [the] principle of maintaining the integrity of those counties articulated . . . and justified in the record would excuse the deviations of . . . .9 percent. I suppose we are suggesting that it would because we are presenting this plan as one *we think would be acceptable.*" R.Tr. 283-284. (Emphasis added).

The court Plan reduced the deviation Appellants deemed acceptable by *two-thirds* to .35 percent. The district court amply justified even that slight deviation by relying on the well established fact that Georgia's primary districting principle was maintaining the integrity of its political subdivisions.[31]

The DOJ's Illustratitve Plan has no probative value as a one person, one vote benchmark. That is because the DOJ did not respect Georgia's voting precincts in drawing its plan because precinct line information was not a part of their computer programming. Instead, the DOJ drew districts at the census block level while the court Plan went to extraordinary lengths to recognize this fundamental traditional districting principle by respecting precinct lines wherever possible.

V. THE COURT PLAN IS NOT RETROGRESSIVE

"A decree of the United States District Court is not within reach of Section 5 of the [VRA]." *Connor v. Johnson*, 402 U.S. 690, 691 (1971); *McDaniel v. Sanchez*, 452 U.S. 130, 138, 101 S.Ct. 2224 (1981). ALCU J.S. App. p. 27. In an effort to avoid application of the DOJ's regulations (28 C.F.R. § 51.54(b)), Appellants

[31] Georgia has 159 counties, more than any State other than Texas. This demographic fact makes adherence to this traditional districting principle compatible with the State's other constitutional and statutory obligations in redistricting. ACLU J.S. App. p. 11, n.8.

argue the benchmark plan for retrogression must contain the same number of voting districts as the plan being reviewed. ACLU J.S. at p. 20; R.Tr. at 279-280. The argument ignores two self evident points. First, only a constitutional plan can serve as a retrogression benchmark. That precludes reliance on the 1992 Plan insofar as the unconstitutional districts are concerned. Second, legislative districting schemes add or lose seats with almost every new census. Just because Georgia added one congressional district does not mean its prior 1982 congressional plan cannot serve as the retrogression benchmark. Retrogression is determined by a simple measurement:

> "Retrogression may be measured by simply comparing the gross number of districts with minority population and voting majorities in the old plan and the number of such districts in the proposed plan. This was essentially the approach taken in *Beer.*" *Burton v. Sheheen*, 793 F.Supp. at 1346.

In 1982, Georgia had one majority minority district, the Fifth. It was maintained in the court Plan, and its minority population was enhanced to 62%. That fact resolves any potential issue of retrogression.

The ACLU's alternative argument is that the court's Plan is retrogressive based on the 1982 Plan, because the percentage of majority minority districts decrease if just one district out of ten is preserved when an eleventh district is being added. Under this novel theory, *any* new district would have to be majority minority. If this approach was adopted, Georgia would have had to make the Eleventh District majority black regardless of the absence of a compact minority population entitled to political recognition under the VRA.

In *Burton v. Sheheen*, *supra*, the ACLU also argued retrogression should be measured by comparison of various alternative plans prepared by litigants and other interested parties, just as they do here. The *Burton* court squarely rejected this argument:

> "The erroneous basis for measuring retrogression urged upon the Court by certain parties . . . is to compare proffered plans one to another without reference to the existing plan. This proposed methodology is flawed in at least two respects. First, it has no basis in case law, the statutes or § 5 regulations [cites]. Second, such methodology serves as a *'racial ratchet'* which presumes that the plan offering the greatest number of black majority districts is, for that reason alone and regardless of other considerations, the benchmark against which all other plans must be measured. Such an approach enshrines the notion that the Voting Rights Act insures proportional representation by race, a proposition that flies squarely in the face of case law and statute. *See Beer, supra,* 425 U.S. at 141, 96 S.Ct. at 1363; 42 U.S.C. § 1973(b)." (Emphasis added).

The ACLU's goal oriented construction of Section 5 would create an unconstitutional statutory mandate that would require virtually *all* future districts to be majority minority districts. The tension between such an interpretation of Section 5 and the Fourteenth Amendment would render the VRA unconstitutional.[32]

VI. APPELLANTS WERE AFFORDED AN ADEQUATE HEARING ON REMEDY

Any issue of the need for a hearing as to what Section 2 required of a court plan was mooted by the court's decision to conduct an evidentiary hearing and include a full Section 2 analysis in its Order.

Appellants rely on *Edge v. Sumter County School District*, 775 F.2d 1509 (11th Cir. 1985), where the Elev-

[32] Assuming the ACLU was correct and Georgia had to have 2 of its 11 districts majority black to avoid retrogression, the ACLU would then contend that the Twelfth District Georgia anticipates receiving in the year 2000 has to be majority black since 2 of 11 is a higher percentage (.18%) than 2 of 12 (16.6%). The argument flows like dominos through the decades of reapportionment. Every new district would necessarily have to be black under this unprecedented percentage approach to retrogression.

enth Circuit held a "district court could not validly adopt a reapportionment plan without determining whether the plan complied with Section 2 of the [VRA]." The circuit court rationalized that any proposal to remedy a Section 2 violation must itself conform with Section 2, citing *United States v. Dallas County,* 850 F.2d 1433 (11th Cir. 1988). Without citation to any other authority, the *Edge* court stated "[a] hearing must be held to permit the parties to submit evidence on Section 2 issues." *Id.* at 1510.[33] *See also Windy Roy v. County of Big Horn,* 641 F.Supp. 1002, 1023 (D.Mont. 1986). That was done in this case.

The predicate for the *Edge* holding, namely that the existing plan violated the VRA, is missing in this case. Appellants argue the opposite side of the coin; i.e., that the VRA mandated adoption of their proposed plan. A remedial hearing to insure the Section 2 violation is "remedied" would be nonsensical where the plan's demise was based on a constitutional rather than statutory defect.

The parties were given ample opportunity to argue and present evidence as to what limits the VRA placed on a judicially drawn plan. They were specifically ordered to comment on Plaintiffs' Remedy 4X plan[34] which closely tracked the remedial plan ultimately adopted. Judicial economy, and the public's need for expedited implementation of the remedial plan, dictated that such a hearing occur in the remedy phase of this litigation. Both Appellants participated fully at the hearing, and have

[33] The Appellants also cite *Burton v. Sheheen, supra,* in support of their contention. *Burton* involved a case where the district court had convened a hearing to afford the parties an opportunity to be heard or otherwise comment on the alternative plans submitted, but *declined* to conduct a full Section 2 review of those plans. That fact distinguishes *Burton* from the case at bar where the district court conducted a full Section 2 analysis.

[34] Remedy 4X was a plan drawn at the Court's request under guidelines established by the Court. Plaintiffs were the only party to comply with the Court's directive to submit such a plan.

not pointed to any meaningful harm suffered by the timing of the hearing.

VII. THE ACLU HAS ABANDONED ANY APPEAL OF THE DISTRICT COURT'S ORDER ON INTERVENTION

The ACLU argues the district court erred in refusing to permit "any further intervention by private parties" with respect to the Second District (ACLU J.S. p.3). To the contrary, the ACLU participated fully in the remedy phase of the Second District litigation.[35] Moreover, the ACLU never sought to add any private citizen with standing residing in the Second District as required by *Louisiana v. Hays*, —— U.S. ——, 115 S.Ct. 2431 (1995), or to argue the issue in their submission.

These facts constitute an abandonment of this aspect of their appeal.[36] A contention not mentioned by the district court in its opinion, and not developed with any fullness before the Supreme Court on direct appeal would be considered abandoned. *See, e.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 83 S.Ct. 1715 (1963).

[35] The DOJ conceded the unconstitutionality of the Second District. The ACLU has never disagreed with that position. Perhaps that is why the ACLU elected not to devote a single sentence to the issue.

[36] Rule 18.3 at subpart 1(h) requires the Appellant set forth "a direct and concise argument amplifying the reasons relied on . . ." Appellants failed to do so.

CONCLUSION

In *Miller v. Johnson, supra,* this Court made clear the Fourteenth Amendment will not allow computer-driven consolidation of black citizens in their "own" non-compact districts as a constitutional way to enhance racial diversity within the halls of government. The Plan on appeal is a carefully drawn remedy of the rampant racial gerrymandering that impacted more than one-third of Georgia's geography. The district court capably accommodated the issue of racial fairness with Georgia's historical districting principles so to undo the DOJ's mischief and blend Georgia's districting traditions with the just demands of a multi-racial society. The worst thing that could happen now would be for this Court to sanction the DOJ's continued efforts to micromanage Georgia politics via a *de facto* Section 5 review of a court drawn remedial plan.

For these reasons, the Appellees request the Court to summarily affirm the district court and dismiss both the pending appeals.

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April, 1996

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APPENDIX

Client : STATE
Plan : SB2EX11
Type : Congressional

Reapportionment Services Office
Suite 407, Legislative Office Bldg

Georgia General Assembly

(4)

No. 95-1425

Supreme Court, U.S.
FILED
APR 29 1996
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In The

Supreme Court of the United States

October Term, 1995

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Appellants,

v.

DAVIDA JOHNSON, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia (Three Judge Court)

BRIEF OPPOSING MOTIONS TO AFFIRM

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I. Two Reasonably Compact Majority Black Districts Can Be Drawn

A. The State's First Plan Was Not Unconstitutional

Appellees contend that the first congressional redistricting plan enacted by the state in 1991 containing two majority black districts was based "solely" on race, and that the Eleventh District in that plan was found to be unconstitutional by the district court. Motion to Affirm of Appellees Miller *et al.*, p. 12; Motion to Affirm of Appellees Johnson *et al.*, p. 14. Both contentions are flatly wrong.

In *Miller v. Johnson*, 115 S.Ct. 2475 (1995) (*Miller I*), the Miller appellees made exactly the *opposite* argument in this Court. In its brief on the merits, the state said that:

> It is undisputed that the General Assembly as a whole found the initial [1991 congressional redistricting] plan enacted to be reasonable. It was not perceived as a 'racial gerrymander.' . . . *There is, in fact, no evidence that any legislator or reapportionment staffer ever believed the initial plan to be offensive as a racial gerrymander.*

Miller v. Johnson, No. 94-631, Brief of Appellant Miller *et al.*, p. 49 (emphasis in original). The state repeatedly stressed "the undisputed consensus of all of the legislators involved – both white and black, Republican and Democrat – that the first plan was reasonable." *Id.* and at p. 18.

In addition, the Johnson appellees never contended in the district court that the first or second congressional redistricting plans were unconstitutional, and introduced

no evidence that they were. In response to a question from the district court, the plaintiffs' lawyer answered that "I don't think that we have a position on the first two plans because they never went to law." *Johnson v. Miller,* Civ. No. 194-008 (S.D.Ga.), Trial Transcript, July 22, 1994, Volume II, p. 23 ("T. Vol., July 22, 1994"). Nor was there any finding by the district court that the first plan enacted by the state was unconstitutional.

The record itself refutes any contention that the Eleventh District was initially drawn "solely" on the basis of race. The first plan excluded "a sizable black population in Baldwin County," T. Vol. II, July 22, 1994, p. 21 (Testimony of Linda Meggers), as well as "a sizable black population of Chatham [County]". *Id.* at 25. Had the construction of the Eleventh District been driven solely by race it would have included these areas.

The speaker of the house said that the Eleventh District as drawn in the first plan "suited me," was "obviously" acceptable, and denied that it was "a racial gerrymander." T. Vol. II, July 22, 1994, p. 81. The chair of the house reapportionment committee similarly testified that in enacting the first congressional plan, "[we] thought we had done pretty well." T. Vol. III, July 22, 1994, p. 252 (Testimony of Bob Hanner). The state complied with the Voting Rights Act, as well as followed its traditional redistricting principles, *i.e.*, "we kept cities and counties intact." *Id.*

B. The Existence Of Other Alternative Plans

While the state now argues *post hoc* that a second majority black district cannot be drawn consistent with the state's traditional redistricting principles, that was not the view of members of the general assembly after the decision in *Miller I.* The speaker of the house, "even after the court decision, said that he thought you ought to have two majority minority seats in Georgia." *Johnson v. Miller, supra,* Trial Transcript, October 30, 1995, p. 433 (Testimony of Linda Meggers) ("T., Oct. 30, 1995").

The house, in fact, after the decision in *Miller I,* adopted a plan that included two majority black districts, the Fifth located in the metropolitan Atlanta area and the Eleventh located in the east central part of the state. *Johnson v. Miller, supra,* Abrams Exhibit 37. The state's demographer testified that the Eleventh District under that plan contained fewer counties than many other Georgia congressional districts, and in terms of its size and length was "within the range of districts that the state has created in the past." T., Oct. 30, 1995, p. 444.

Other proposed remedial plans similarly contained two reasonably compact majority black districts, *e.g.*, the coalition 3RN Plan, T., Oct. 30, 1995, p. 445, the Illustrative Plan submitted by the Department of Justice, *United States v. Johnson,* No. 95-1460, J.S. App. 44a-45a, and several plans submitted by the Abrams appellants. T., Oct. 30, 1995, p. 297, Abrams Exhibit 35, 36.

In criticizing appellants' plans, the Johnson appellees go to absurd lengths. They say that two majority white counties included in one of the plans are "a 'whole

county' land bridge." Motion to Affirm of appellees Johnson *et al.*, p. 6. Of course, whole counties cannot be "land bridges," *i.e.*, narrow unpopulated corridors. *Miller v. Johnson, supra*, 115 S.Ct. at 2484. In addition, appellants "least change" plan split no rural counties. T., Oct. 30, 1995, 301; Abrams Exhibit 36. It therefore did not subordinate the state's traditional redistricting principles to race.

According to appellants' expert, one of the overriding goals of the "least change" plan was "to show that it is possible to draw districts in the State of Georgia for members of Congress that did not use race as a predominant feature and on the other hand were fair to black as well as white voters." T., Oct. 30, 1995, 301. It clearly was possible to draw a second reasonably compact majority black district based on the state's traditional redistricting principles, but the district court, substituting its own redistricting principles for those of the legislature, refused to do so.[1]

[1] The Johnson appellees make the extraordinary and erroneous claim that the record is "devoid" of any analysis of voting patterns justifying any need for majority black districts in Georgia. Motion to Dismiss of Appellees Johnson *et al.*, p. 23. To the contrary, there was extensive evidence of racial bloc voting introduced during the trial of the case, and in its remedial order the court found that "the percentage of black registered voters as close to fifty-five percent as possible was necessary . . . to avoid [minority vote] dilution." J.S. App. 26.

II. The Issue Presented Is Whether A Court May Ignore State Policy

The issue presented in this appeal is not, as the state appellees contend, whether a court may make "significant changes" in a redistricting plan found to violate the Fourteenth Amendment. Motion to Affirm for appellees Miller *et al.*, p. 6. By definition, some change is required. Rather, the issue is whether a court may accord no deference whatever to a state's legislative plan, including those portions not found to be unconstitutional, ignore the state's redistricting policy choices, and proceed as if the state had adopted "no plans." J.S. App. 7.

The district court was of the view that "Georgia's current congressional plan cannot form the basis for the remedy we now construct." J.S. App. 4. *See also* J.S. App. 5 ("we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals"). Moreover, what the district court did is as revealing as what it said. It totally relocated the Eleventh District and put it in "the Northeast Atlanta corridor." J.S. App. 14. It also drastically reconfigured the Third, Tenth, and Eight Districts. The state's argument that the district court "[ ]regarded the legislature's earlier actions in 1991 and 1992" are not supported by the facts in this case. Motion to Affirm for Appellees Miller *et al.*, p. 11 n.2.

The court committed legal error in taking a "blank check" approach to remedying the constitutional violations in this case. *Missouri v. Jenkins*, 115 S.Ct. 2038, 2058 (1955) (O'Connor, J., concurring). *See also Upham v. Seamon*, 456 U.S. 37, 42 (1982) (a court may not reject state

policy more than is necessary "to meet the specific constitutional violations involved").

III. There Was No Section 2 Hearing On The Court's Plan

Appellees mistakenly claim that appellants were given a hearing on their Section 2 dilution claim. The district court did conduct a hearing at which it allowed the parties an opportunity to present proposed remedial plans, but it did not hold a hearing to allow the parties an opportunity to comment and present evidence concerning the plan that the court actually adopted. In light of *SRAC v. Theodore*, 113 S.Ct. 2954 (1993), the court erred.

IV. The Court's Plan Was Retrogressive

Appellees say that appellants' position is that "a new plan could never have less than ten percent majority black districts." Motion to Affirm of appellees Miller *et al.*, p. 14-5. Correctly stated, appellants' position is that given the state's existing demographics, a plan that contains only one majority black district is retrogressive within the meaning of Section 5, and that is true whether the benchmark is the 1982 plan, the 1991 plan, or some other plan embodying the state's redistricting goal of creating two majority black districts. If the state's black population were to decline, or disappear altogether, appellants would not argue that the benchmark for retrogression would remain unchanged.

The Miller appellees' argument that *City of Richmond v. United States*, 422 U.S. 358 (1975), contains a "good

government" exception to Section 5 is misplaced. *City of Richmond* held that municipal annexations were not objectionable under Section 5 where the resulting districting "system fairly reflects the strength of the Negro community as it exists after the annexation" 422 U.S. at 371. The court ordered plan in this case does *not* fairly reflect the strength of black voters as it currently exists, and under the rationale of *City of Richmond* is retrogressive.[2]

The objected to 1991 plan was not legally enforceable as a matter of federal law because it was objected to under Section 5. However, it did embody the state's redistricting policy of creating two majority black districts which was not objected to by the Attorney General and which can provide a benchmark for determining retrogression. *Upham v. Seamon, supra*, 456 U.S. at 42.

In the related case of *Johnson v. Miller*, Civ. No. CV196-040 (S.D.Ga.), the state has argued that plans for the house and senate objected to under Section 5 should nonetheless be implemented by the three judge court on an interim basis for the 1996 elections because "the 1995 plans reflect a host of political and policy choices throughout the state. It is those lines . . . that merit deference." Brief of Defendants Miller, Howard and Massey for the Preliminary Injunction, p. 11. While appellants do not believe an objected to plan can be implemented by

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[2] The Johnson appellees erroneously suggest that Section 5 standards are not applicable to court ordered plans. Motion to Affirm for Appellees Johnson *et al.*, p. 11. While court ordered plans are not subject to preclearance, they nevertheless must comply with Section 5 standards. McDaniel v. Sanchez, 452 U.S. 130, 148-49 (1981).

a court, *Clark v. Roemer*, 500 U.S. 646, 654 (1991), the state's 1991 plan, as the state argued in the house and senate case, can serve as a benchmark for determining retrogression since it embodies the state's "political and policy choices" of having two majority black districts which were not objected to by the Attorney General.

V. Appellants Have Not Taken Inconsistent Positions On Deviation

The Johnson appellees wrongly claim that "[e]very alternative plan" advanced by appellants had a deviation that greatly exceeded .35%, and that they took an inconsistent position in the district court on the issue of permissible deviation from ideal district size. First, one of the plans advanced by appellants has a deviation of only .29%, which is lower than the deviation contained in the court ordered plan. *Johnson v. Miller, supra*, Supplemental Declaration of Selwyn Carter, Plan A.

Second, counsel for appellants stressed that the court "has really got to be concerned about deviations in any plan. . . . There is no *de minimis* deviation and a jurisdiction is obligated to make a good faith effort to comply with population equality concepts." T., Oct. 30, 1994, 281-82. Counsel specifically said that "if the Court is going to have a higher deviation . . . you must be careful to articulate the reason for doing so," that the deviation in one of appellants' plans was .93%, "that you could split some counties . . . and cure those deviations," and that *appellant's plan* preserving counties intact and creating two minority districts "might" be acceptable under *Karcher v. Daggett*, 462 U.S. 725 (1983). *Id.* at 283-84. The

district court, however, in adopting a plan that included only one majority black district, failed to articulate a sufficient reason for not complying with the standard of population equality set out in *Karcher*.

CONCLUSION

For the above reasons, this Court should summarily reverse or in the alternative note probable jurisdiction of this appeal.

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FILED
JUL 19 1996
CLERK

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QUESTIONS PRESENTED

1. Whether the district court, in drawing a remedial congressional redistricting plan, erred in disregarding the state's legislative policy choices and making changes that were not minimally necessary to cure the constitutional defects in the existing plan?

2. Whether the court ordered plan, which fragmented the black population in two majority black districts and dispersed it throughout the state, dilutes minority voting strength in violation of Section 2 of the Voting Rights Act?

3. Whether the court ordered plan, which reduced the number of majority-minority districts from three to one, is retrogressive under Section 5 of the Voting Rights Act?

4. Whether the court ordered plan, which contains unnecessary population deviations, complies with the one person, one vote standard of Article I, Section 2 of the Constitution?

5. Whether the court erred in peremptorily barring private intervention to defend the constitutionality of the Second Congressional District although state officials did not seriously contest plaintiffs' claims of invalidity nor did they or the United States appeal the court's finding that the Second District was unconstitutional?

PARTIES TO THE PROCEEDING

The appellants are Lucious Abrams, Jr., Rev. G. L. Avery, William Gary Chambers, Sr., and Karen Watson. The appellees are Davida Johnson, Pam Burke, Henry Zittrouer, George L. DeLoach, and George Seaton. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of State of Georgia. Max Cleland has been succeeded as Secretary of State by Lewis Massey. The United States of America was a defendant intervenor.

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OPINIONS BELOW

The December 13, 1995 opinion of the three-judge court for the Southern District of Georgia implementing a court ordered redistricting plan for Georgia's congressional districts is unreported and appears at J.S.App. 1. The August 22, 1995 order of the district court denying intervention to defend the constitutionality of Georgia's Second Congressional District is unreported and appears at J.S.App. 42. The January 8, 1996 order of the district court denying appellants' motion for a hearing and reconsideration is unreported and appears at J.S.App. 44.

JURISDICTION

The opinion and order of the three-judge court for the Southern District of Georgia was entered on December 13, 1995. Appellants filed their notice of appeal on January 11, 1996. J.S.App. 46. Probable jurisdiction was noted on May 20, 1996. 64 U.S.L.W. 3773. The jurisdiction of this Court is invoked under 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the case are Article I, Section 2 of the Constitution of the United States, and Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§1973 and 1973c, the pertinent texts of which are set out at J.S.App. 49-52.

STATEMENT OF THE CASE

A. The Parties Below. Appellants, who were defendant intervenors below ("Abrams intervenors"), are a group of black and white registered voters and residents of Georgia's Eleventh Congressional District. Appellees, plaintiffs below, are white residents of Georgia who challenged the state's 1990 congressional redistricting on constitutional grounds. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of State of Georgia. Max Cleland has been succeeded as Secretary of State by Lewis Massey. The United States of America was also a defendant intervenor.

B. *Miller v. Johnson* and Its Aftermath. In *Miller v. Johnson*, 115 S.Ct. 2475 (1995), this Court held that Georgia's Eleventh Congressional District was unconstitutional because the state, absent a compelling reason for doing so, had relied upon race as a predominant factor in redistricting in substantial disregard of customary and traditional districting practices. The redistricting plan contained three majority black districts out of eleven, the Second, the Fifth, and the Eleventh, but only the Eleventh was challenged in the district court. *Johnson v. Miller*, 864 F.Supp. 1354 (S.D.Ga. 1994) (*Johnson I*), *aff'd sub nom. Miller v. Johnson*. Blacks are 27% of the population of the state of Georgia. J.S.App. 39.

After the decision in *Miller v. Johnson* the Governor called the general assembly into special session to redistrict the state's congressional districts. Ga. Laws 1995, Ex. Sess., p. 1. The three-judge court conducted a hearing on

remand on August 22, 1995. It ruled that "Georgia has until October 15th to enact a congressional reapportionment plan and have it precleared before this Court will become vigorously active in handling the matter of remedy." *Johnson v. Miller*, Civ. No. CV194-008 (S.D.Ga.) Transcript of Hearing, August 22, 1995, p. 110 ("T., Aug. 22, 1995").

The court also allowed the plaintiffs to amend their complaint to add additional plaintiffs and to challenge the constitutionality of the state's majority black Second Congressional District. The court refused, however, to allow appellants to defend the constitutionality of the Second District and barred in advance any further intervention by private parties. The court ruled that:

> The Abrams intervenors will not participate . . . in the evidentiary proceedings on the matter of the constitutionality of the Second Congressional District of Georgia. It is our view that there is no need for intervenors in this litigation. The record is that the State of Georgia and its elected officials will defend the congressional districts that were enacted by the legislature to the full extent of the law. We have seen that and we expect that they will do that again and therefore we see no need to have intervenors.

J.S.App. 42-3.

The general assembly remained in special session for approximately a month. Defendant Murphy took the position that "you ought to have two majority minority seats in Georgia." *Johnson v. Miller*, Trial Transcript, October 30, 1995, p. 433 (Testimony of Linda Meggers) ("T., Oct. 30, 1995"). The house, in fact, adopted a plan at the

special session that included two majority black districts, the Fifth located in the metropolitan Atlanta area and which had a 51.3% black voting age population (BVAP), and the Eleventh (50.1% BVAP) located in the east central part of the state. Status Report, Aug. 29, 1995 (Plan MSLSS, August 25, 1995).

The senate passed a plan that contained only one majority black district, the Fifth (51.5% BVAP). Status Report of Defendants Miller, Howard, and Cleland. The house and senate were unable to resolve their differences in conference committee, and on September 13, 1995 the defendants notified the court that the general assembly had been unable to enact a congressional redistricting plan and had adjourned. J.S.App. 2.

The court held a trial on the issue of the constitutionality of the Second Congressional district on October 30, 1995.[1] Immediately after the trial, the court conducted a hearing as to remedy instructing the parties "to assume, arguendo at least, that the Second District may be declared unconstitutional." T., Oct. 30, 1995, p. 5.

Prior to the October 30, 1995 trial, defendant Murphy stipulated that the Second District "fails the constitutionality test as articulated by the Supreme Court." Joint Stipulations of Fact and Statement of Issues Pertaining to Plaintiffs' Challenge to Georgia's Second Congressional District, stip. 108. The remaining state defendants did not vigorously defend the constitutionality of the Second District.

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[1] Appellants did not participate in that trial.

The state did not argue that a majority black Second District was needed to eliminate the effects of past discrimination in voting, nor to comply with Section 2 of the Voting Rights Act. *Johnson v. Miller*, Order of December 1, 1995, slip. op. at 10, 12 ("Order, Dec. 1, 1995"). By their own admission, "the State Defendants presented no witnesses and asked no questions of other witnesses at the liability hearing." Response of Defendants Miller, Howard and Cleland to 'Plaintiffs' Second Interim Petition for Fees and Expenses,' p. 5.

The state's defense was that the Second District differed from the Eleventh because the Second had always existed in the southwestern corner of the State, there was a greater community of interest in the Second District, and the Second District had a lower percentage of black voters. Order, Dec. 1, 1995, slip. op. at 10-1. The court rejected these defenses concluding that "race was the overriding and predominant motivating factor in designing the Second Congressional District," and the state "fails to meet its burden under the strict scrutiny analysis." *Id.* at 12.

The United States did not contest liability. The district court found that "[t]he Department of Justice contended that, as a matter of law, the Second District was unconstitutional" in light of *Miller v. Johnson*. Order, Dec. 1, 1995, slip op. at 3 n.1.

The three-judge court declared the Second District unconstitutional on December 1, 1995. J.S.App. 1-2. None of the state defendants appealed the decision.

C. The Remedy Phase. Prior to the October 30, 1995 trial, the court entered two orders. The first instructed the

parties to submit "a plan that makes the least changes, in terms of line drawing, in Georgia's present congressional plan but at the same time brings the Eleventh and the Second Congressional Districts . . . into compliance with the United States Constitution." Order, October 17, 1995, slip op. at 2-3. The second order directed the parties to "further submit a plan based on the first plan that Georgia submitted to the Department of Justice [following the 1990 census] for preclearance." Order, October 20, 1995, slip op. at 1. Despite the submission of least-change alternatives by the parties and *amici*, the district court completely redrew the congressional map of Georgia.

State defendants Miller, Howard, and Cleland refused to submit or sponsor any plans, advising the court that:

> the Defendants do not know what the Constitution now requires in terms of remedy. They do not have a view of what plan might satisfy the particular criteria set forth in the Court's orders. For that reason, they are unable to submit what the Court directs.

Submission of Defendants Miller, Cleland and Howard in Connection with the Issue of Remedy, p. 2. Defendant Howard, however, provided the court a copy of the redistricting plan that had passed the senate. *Id.*

Defendant Murphy submitted a plan which he said "represents only his own opinion and beliefs as an individual public officer and not necessarily those of any other member of the House of Representatives or the House Democratic Caucus." Defendant Murphy's Remedy Submission in Response to Orders of October 17 and 20, 1995, p. 3. His plan created only one majority black

district, the Fifth (54% VAP). The Second District had a black VAP of 36.8%, and the Eleventh District a black VAP of 36.1%. *Id.*

Appellants, the United States, and *amici* incumbent members of Congress (including Representatives John Lewis and Newt Gingrich) submitted various remedial plans. They are discussed below.

1. Appellants' Proposed Plans. Appellants submitted four plans prepared by their expert Selwyn Carter.[2] One of the plans was a least-change plan (referred to as ACLU1A), submitted at the direction of the district court, designed to cure the constitutional defects in the existing plan but at the same time make no more changes than were necessary to accomplish that purpose. J.App.* 198-99.

In *Miller v. Johnson* this Court identified the manner in which the state had unconstitutionally subordinated its traditional redistricting principles to race in the construction of the Eleventh District, *i.e.*, "by extending the Eleventh to include the black populations in Savannah;" by splitting "Effingham and Chatham Counties . . . to make way for the Savannah extension, which itself split the City of Savannah;" by "splitting eight counties and five municipalities along the way;" and, by using "narrow corridors" to link "the black neighborhoods in Augusta, Savannah and southern DeKalb County." 115 S.Ct. at 2484. The district court, in its December 1, 1995 opinion,

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[2] Mr. Carter, a specialist in redistricting, is the director of voting rights programs for the Southern Regional Council, a biracial organization in Atlanta, Georgia. T., Oct. 30, 1995, p. 294.

identified features of the Second District which it found rendered it unconstitutional, *i.e.*, "the sole reason for splitting precincts was racial and . . . the predominant reason for splitting . . . counties and cities was racial as well;" and, the district "makes use of narrow land bridges to connect parts of the district and involves a number of irregular appendages." Order, Dec. 1, 1995, slip op. at 6.

In preparing appellants' least-change plan, Mr. Carter proceeded in light of this Court's findings with regard to the Eleventh District and in anticipation of the findings of the district court with regard to the Second District. His "overriding methodology . . . was to correct the constitutional defects in the Eleventh Congressional District and assume that the Second Congressional District was unconstitutional and correct . . . [the] assumed defect in that district and to maintain the remaining districts with as little change as possible." J.App. 161. He also applied the redistricting principles embodied in the state's prior plans, particularly the 1970 and 1980 plans. Those principles included constructing districts with a substantial number of counties, and which contained both rural and urban areas. J.App. 165.

Mr. Carter removed the extensions of the Eleventh District through Effingham and Chatham Counties because they were identified by the Court as being "examples of racial gerrymandering of the district." J.App. 161. He regularized the configuration of Richmond County "by bringing in a considerable number of white voters previously in the Tenth District and transferring them to the Eleventh District." J.App. 161. Richmond County, an urban county, remained split under the least-change plan but the split was not along racial lines. *Id.*

He reaggregated Baldwin, Twiggs, and Wilkes Counties, portions of which had been placed in the Eleventh District, and placed them in other districts. The reason for the reaggregation was to "restore the integrity of those rural political subdivisions and make the integrity of those subdivisions predominant. Clearly here . . . an attempt was made to draw a plan in which race was not the predominant factor." J.App. 162.

He eliminated the narrow land corridor through Henry County and included the county in its entirety in the Eleventh District. J.App. 166. He also removed portions of DeKalb County from the Fifth District and placed them in the Eleventh District so that the boundary between the Fifth and the Eleventh Districts would be the county line. J.App. 162-63, 170.

Under appellants' least-change plan, the Eleventh District has a black VAP of 52.8%. J.App. 198. It is composed of 14 whole counties, and only the urban counties of Richmond and DeKalb are split. J.App. 163.

A number of changes were similarly made in the Second District. In *Miller*, this Court noted the criticism of the district court that "[t]he black population of Meriwether County was gouged out of the Third District and attached to the Second District by the narrowest of land bridges." 115 S.Ct. at 2484. Accordingly, Mr. Carter reaggregated Meriwether County and placed the county in its entirety in the Seventh District. J.App. 174. Other counties which had been split by the Second District – Lowndes, Colquitt, Dougherty, Lee, Crisp, Dooly, Houston, Bleckley, Twiggs, and Crawford – were also reaggregated.

Lowndes, Colquitt, Lee, Crisp, Houston, Bleckley, and Twiggs were placed in the Eighth and Dougherty, Dooly, and Crawford were placed in the Second. Again, the reason for the reaggregation was to restore the integrity of the rural counties and make their preservation a predominant redistricting criterion. J.App. 168.

In order to comply with one person, one vote, Mr. Carter moved Talbot County from the Second District to the Third. J.App. 167, 170. The only counties split by the Second District are Bibb and Muscogee, both of which are urban. The county governments of both counties passed resolutions requesting that the two counties be split under any remedial plan to increase their representation in Congress, a non-racial factor which Mr. Carter took into account in drawing the Second District. J.App. 169.

In splitting Bibb County, Mr. Carter sought to eliminate a narrow land bridge into the city of Macon by including a substantial number of white residents of the city in the Second District. J.App. 168. The existing Second District also contains other urban areas, *i.e.*, Columbus and Valdosta. Because the state "had historically linked rural and urban areas together to form congressional districts," he kept these areas in appellants' least change plan. J.App. 168, 170.

The changes in the remaining districts were those minimally required by the changes in the Second and Eleventh Districts. Because Effingham and Chatham Counties were placed in the First District, Montgomery, Tattnall, and Toombs Counties were taken out of the First

and placed in the Eighth District to comply with one person, one vote. Clinch County was moved from the Eighth to the First, also to comply with one person, one vote. J.App. 166-67. There are no split counties in the First District. *Id.*

Baldwin County was reaggregated and added to the Third District, together with Talbot County, to comply with one person, one vote. J.App. 170. Portions of Clayton County that had been in the Third were, as noted above, placed in the Fifth District to comply with one person, one vote, and to avoid retrogression. J.App. 170. There are eleven intact counties in the Third, and the only split counties are the urban counties of Bibb, Muscogee, and Clayton. J.App. 170-71. Maintaining the integrity of counties was the predominant factor in the construction of the district, as it was in the construction of the plan as a whole. J.App. 171.

Changes in the Fourth District were minimal. They involved switching precincts between the Fourth and Tenth Districts and precinct changes in DeKalb County to comply with one person, one vote. J.App. 171.

In the Fifth District, portions of Clayton County were added to compensate for the portions of DeKalb County previously in the Fifth that were moved to the Eleventh to make the DeKalb/Fulton County line the boundary between the two districts. J.App. 172-73. The part of Clayton County that was added contained enough black population to avoid retrogression in the majority black Fifth District, but was whiter overall than the part of DeKalb County that was taken out. J.App. 170, 173. Portions of northern Fulton County were moved to the

Fourth District to comply with one person, one vote, and also to avoid retrogression in the Fifth District. J.App. 173.

The changes in the Sixth District were also minor. They involved a handful of precinct changes in Gwinnett and Cobb Counties to comply with one person, one vote. J.App. 173.

The principal change in the Seventh was the addition of Meriwether County from the Second District, along with minor precinct changes involving Cobb County, again to comply with one person, one vote. J.App. 174.

In the Eighth District changes were made because of changes in other districts, to comply with one person, one vote, and to keep counties intact. J.App. 174-75. Montgomery, Toombs, and Tattnall Counties, formerly in the First District, were added to the Eighth. Clinch County was excluded, as was the previous extension into Bibb County. J.App. 175.

There were no changes in the Ninth District. J.App. 175. In the Tenth District, Wilkes County was reaggregated and added. A portion of Richmond County, which was heavily white, was moved to the Eleventh District, and there were a few precinct changes in Gwinnett County. All of these changes were made to comply with one person, one vote. J.App. 175-76.

None of the rural counties outside the metropolitan Atlanta area were split in the least-change plan. J.App. 176. A total of nine counties were split, all in urban areas of the state. The court ordered plan split six urban counties. J.S.App. 15. As the district court found, "[g]iven

the population density of those counties, it would be impossible to avoid splitting any counties." J.S.App. 15 n.12.

Under appellants' least-change plan the Fifth District contained a black VAP of 54.3%, and the Second a black VAP of 45.5%. All the districts were contiguous, were based upon the state's traditional redistricting principles, were reasonably compact, and cured the constitutional defects identified by this Court.

The total deviation among districts in appellants' least-change plan was 0.93%, but the deviation could have been lowered with the splitting of additional counties. According to Mr. Carter, "if you draw a plan at a lower level of geography you can get more precise and bring the deviations down to almost zero if you want." J.App. 164.

Appellants also tendered three other plans. J.App. 141-51. One of the plans, designated as Plan A, contained three majority black districts, had a total deviation among districts of 0.29%, but split more counties that ACLU1A.[3] J.App. 194-95. Plan C, which contained two majority black districts, split fewer counties than Plan A but as a result contained a greater total deviation, *i.e.*, 0.99%. J.App. 197.

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[3] In preparing the joint appendix, appellants discovered that in Plan A a small area in the Ninth District was misallocated to the Tenth District. The misallocation can be easily corrected and the correction does not affect the total deviation among districts.

2. Other Proposed Plans. A plan containing two majority black districts, known as Amicus R, was submitted by Congressmen John Lewis and Newt Gingrich. J.App. 204. It made minimal changes in the First, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Districts, and only those required to comply with one person, one vote, and cure the constitutional defects identified in the Second and Eleventh Districts. T., Oct. 30, 1995, pp. 356-57. Counties were reaggregated (seven remained split) and appendages were removed. The Amicus R plan was also designed to be a minimal disruption plan in the sense that it did not create "any incumbent contest and it leaves an identifiable representative in each district." T., Oct. 30, 1995, p. 360. The plan was a "consensus" plan and had the support of ten of the eleven members of the state's congressional delegation. T., Oct. 30, 1995, p. 364.

The United States also submitted a plan, known as the Illustrative Plan, to show that a remedial plan could be drawn which created two compact majority black districts and contained minimal population deviations. *United States v. Johnson*, No. 95-1460, J.S.App. 44a. The plan split only two counties outside the metropolitan Atlanta area, Bibb and Muscogee, and contained a total deviation of 0.19%, the lowest deviation of any of the plans submitted to the district court. The black VAP in the Second District was 42%, the black VAP in the Fifth District was 53.7%, and the black VAP in the Eleventh District was 51%. *United States v. Johnson*, J.S.App. 45a.

D. History of Discrimination. The record of the trial in *Johnson I* involving the Eleventh District was made part of the record of the trial involving the Second District. Order, Dec. 1, 1995, slip op. at 4 n.2. In *Johnson I* the

district court found that the history of discrimination in voting and other areas "against black people in the State of Georgia need not be presented for purposes of this case." *Abrams v. Johnson*, No. 94-797, J.S.App. 119; *Johnson I*, Trial Transcript, Volume V, p. 142 (*Johnson I*, T.Vol.). The court took judicial notice that:

> Georgia's history on voting rights includes discrimination against black citizens. From the state's first Constitution – which barred blacks from voting altogether – *through recent times*, the state has employed various means of destroying or diluting black voting strength. For example, literacy tests (enacted as late as 1958) and property requirements were early means of excluding large numbers of blacks from the voting process. Also, white primaries unconstitutionally prevented blacks from voting in primary elections at the state and county level.
>
> Even after black citizens were provided access to voting, the state used various means to minimize their voting power. For example, until 1962 the county unit system was used to undermine the voting strength of counties with large black populations. Congressional districts have been drawn in the past to discriminate against black citizens by minimizing their voting potential. State plans discriminated by packing an excessive number of black citizens into a single district or splitting large and contiguous groups of black citizens between multiple districts.

Abrams v. Johnson, No. 94-797, J.S.App. 119-20 (emphasis added).[4] *See also Miller v. Johnson*, 115 S.Ct. at 2500-02

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[4] This history and its continuing effects are set out in greater detail in the stipulations of the parties. *See, e.g., Johnson*

(noting the history of discrimination and denial of "equal voting rights" in Georgia) (Ginsburg, J., dissenting).

E. Racial Bloc Voting. There was substantial evidence of racial bloc voting. The experts who testified were in agreement that voting in Georgia is racially polarized. Dr. Allan Lichtman, an expert for the United States, examined more than 300 elections spanning an approximately 20-year period. *Johnson I*, T.Vol.V,200. He used the standard statistical techniques of ecological regression and extreme case analysis, and examined four sets, or levels, of black/white contests: (1) county level contests throughout the state; (2) county level contests within the Eleventh and Second Districts; (3) six statewide elections partitioned within the boundaries of the Eleventh and Second Districts; and, (4) the 1992 Eleventh and Second District elections. *Johnson I*, Department of Justice Exhibits 24, 41 (*Johnson I*, DOJ Ex.); T.Vol.V,199.

As for level one, Dr. Lichtman's analysis showed "strong" patterns of racial bloc voting, with blacks and whites voting "overwhelmingly" for candidates of their own race. *Johnson I*, DOJ Ex. 24 at 7-8. Level two and three analysis also showed "strong" patterns of racial bloc voting. *Id.* at 8-9; T.Vol.V,202-03. In five of the six statewide contests in the Eleventh District, at least 89% of

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I, Stips. 5 (whites registered in 1992 at 70.2% of voting age population; blacks at 59.8%), 76-103 (detailing the history of discrimination in voting), 104-129 (describing segregation in educational institutions), 130-134 (noting other forms of racial discrimination), 135-55 (stipulating to racial disparities in income, education, unemployment, and poverty status). Abrams v. Johnson, No. 94-797, J.App. 9-33.

blacks voted for black candidates, and at least 74% of whites voted for white candidates. *Johnson I*, DOJ Ex. 24, at 9. The exception to the pattern was the 1992 Democratic primary for labor commissioner in which the black candidate got 45% of the white vote, and 96% of the black vote. In the ensuing primary runoff the black candidate got only 26% of the white vote, and 92% of the black vote. *Id.* at 14; J. App. 66-71.

The 1992 primary and runoff in the Eleventh District were also racially polarized. In the primary, which involved one white and four black candidates, the white candidate, DeLoach, was the first choice among whites with 45% of the white vote. Cynthia McKinney, who was the leading vote getter over all, was second among whites with 20% of the white vote. *Johnson I*, DOJ Ex. 24 at 17; *Abrams v. Johnson*, No. 94-797, J.App. 22. In the run-off, whites increased their support of DeLoach to 77%. McKinney's white vote support increased to just 23%. *Id.*

Dr. Lichtman found voting patterns to be different in statewide non-partisan judicial elections in which appointed blacks ran as incumbents. He included these contests in his report but treated them as having "minimal relevance." *Johnson I*, T.Vol.V,228.

With the exception of judicial elections in which blacks were first appointed and ran as incumbents, no black has ever been elected to a statewide office in Georgia. *Johnson I*, T.Vol.VI,77. No black, other than Andrew Young, has ever been elected to Congress from Georgia from a majority white district. *Johnson I*, Stip. 241.

Dr. Lichtman also testified that blacks have a lower socio-economic status than whites which was a barrier to

blacks' participation in the political process. *Johnson I*, T.Vol.V,206. In the 1988 and 1992 presidential elections, black turnout was 14-15% lower than white turnout. *Id.* at 208. In the 1992 elections in the Eleventh District, blacks were 51.5% of all voters in the primary, but only 46-47% of voters in the runoff. *Id.* at 212-13; J. App. 77-8.

The state's expert, Dr. Joseph Katz, performed an independent homogeneous precinct analysis to estimate "average racial voting patterns." *Johnson I*, Defendants Exhibit 170; T.Vol.V,48,81. He agreed that "[w]hites tend to vote for white candidates and blacks tend to vote for black candidates." *Johnson I*, T.Vol.V,84. He concluded that whites vote for white candidates in the range of 71-73%. *Id.* He did not believe a black candidate had an even (50%) chance to win until a district contained at least 50% of black registered voters. *Id.* at 84-5. Dr. Katz also found judicial elections to be "materially different" and that it would be "inappropriate" to use them in determining voting patterns in congressional elections. *Id.* at 74, 83.

The plaintiffs' expert, Dr. Ronald Weber, agreed there was "some evidence" of racial polarization in voting. *Johnson I*, T.Vol.IV,259. Taking into account judicial elections involving appointed black incumbents, he did not think the racial bloc voting was "very strong." *Id.* at 324.

Of the 40 black members of the Georgia general assembly, only one was elected from a majority white district. *Johnson I*, T.Vol.IV,236; J.A. 26-7. Of the 31 black members of the house, 26 were elected from districts that were 60% or more black. Of the nine black members of the senate, eight were elected from districts that were

60% or more black. *Johnson I*, Abrams Exhibits 23-4; T.Vol.VI,208; DOJ Ex. 57; T.Vol.VI,204. While only one black was elected from a majority white district, whites won in 16 (29%) of the 55 majority black house and senate districts. *Abrams v. Johnson*, No. 94-797, J.App. 26-7.

F. The Decision of the District Court. The court issued its plan on December 13, 1995 (Judge Edmondson dissenting). The district court, in its own words, proceeded as if the state had adopted "no plans." J.S.App. 7. According to the court,

> Georgia's current congressional plan cannot form the basis for the remedy we now construct because it does not represent the goals of Georgia's historic policies nor the state legislature's true intent.

J.S.App. 4. *Also see* J.S.App. 5 ("we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals"), J.S.App. 6 ("we are unable to use Georgia's current plan as the basis for a remedy"), J.S.App. 7 ("the Court's task is akin to those cases in which states had no plans").

The district court was of the view that no deference was due the existing plan because it was the product of "Department of Justice [i]nterference." J.S.App. 4. The court said that "DOJ basically used the preclearance process to force Georgia to adopt the ACLU redistricting plan and, in the process, subvert its own legislative preferences to those of the DOJ." J.S.App. 5. Accordingly, the court was "not bound by *Upham* to make only minimal changes to the current plan in fashioning a remedy."

J.S.App. 5-6. Adopting a remedy that would be "minimally disruptive to Georgia's current plan was not an option." J.S.App. 29. Any remedy "would necessarily have resulted in drastic changes." J.S.App. 6.

The court's plan eliminated two of the three majority black districts in the existing plan, reducing the black VAP in the Second District from 52.3% to 35.1%, and in the Eleventh from 60.4% to 10.8%. *Johnson I*, 864 F.Supp. at 1366 n.12. The black VAP in the remaining majority black district, the Fifth, was increased from 53% to 57.2%. J.S.App. 16.

The court refused to draw a second majority black district because in its view "Georgia's minority population is not geographically compact." J.S.App. 22. The court conceded, however, that:

> If Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so.

J.S.App. 22 n.16.

In concluding that blacks were not geographically compact, the court failed to discuss the remedial plans proposed by appellants and the *amici*. The court dismissed the Illustrative Plan proposed by the United States because it allegedly split "numerous counties outside the metropolitan Atlanta area." J.S.App. 8, n.4. As noted *supra*, the Illustrative Plan in fact split only two counties outside the metropolitan Atlanta area.

The court's findings regarding the existence of racial bloc voting were contradictory. On the one hand, the court held that "while some degree of vote polarization exists, it is 'not in alarming quantities.' *Johnson I*, 864 F.Supp. at 1390." J.S.App. 23. For that reason, "the remedy we now impose meets the requirements of Section 2 without containing two majority-minority districts." J.S.App. 24.

On the other hand, the court held that "Section 2 of the VRA required the Court to maintain the Fifth District as a majority-minority district." J.S.App. 18. Because of racial bloc voting "based on statewide figures," J.S.App. 26 n.18, a district containing "the percentage of black registered voters as close to fifty-five percent as possible was necessary . . . to avoid dilution of the Fifth District minorities' rights." J.S.App. 26. The plan adopted by the court thus preserved the Fifth District as a majority-minority district. At the same time, the black population in the Second and Eleventh Districts was dispersed throughout the state into other districts. The black VAP was increased in the First District from 20.3% to 27.7%, in the Third from 16.3% to 22.5%, in the Fourth from 10.8% to 32%, in the Eighth from 18.4% to 28.3%, and in the Tenth from 16.5% to 34.5%. *Abrams v. Johnson*, No. 94-797, J.App. 20; J.S.App. 39.

The court's plan relocated the Eleventh District, which under all its prior configurations ran from South DeKalb County to the southeast, and put it "in the Northeast Atlanta corridor" where it would have an "urban/suburban flavor," J.S.App. 13-4, and be "a 'radius' district reaching from suburban Atlanta to the state line." J.S.App. 14. The justification for the relocation was that

this was an area containing a "community of interests" and "where future growth is anticipated." J.S.App. 13-4. The Eleventh District was also structured around "Interstate Eighty-Five as a very real connecting cable." J.S.App. 14.

The court substantially reconfigured the Third, Eighth, and Tenth Districts as well. Under the prior plan the Third District was located essentially in the center of the state. *Abrams v. Johnson*, No. 94-797, J.App. 51. The court's plan moved it to the western edge of the state. J.S.App. 41. The new Tenth District was relocated south to fill the void left by moving the Eleventh to the northeast Atlanta corridor. *Id.* Under the court's plan the Eighth District runs from the Florida line north to metropolitan Bibb County and thence further north to the suburbs of Atlanta, including in a single district the metropolitan hub counties of Lamar, Upson, and Monroe with the rural, south Georgia counties of Echols, Clinch, and Charlton. *Id.*

The court's plan moved a total of 2,020,820 people – 31.2% of the state's population – into new congressional districts. Abrams Intervenors' Motion for Hearing and for Reconsideration, Declaration of Linda Meggers. By contrast, appellants' proposed least-change plan (ACLU1A) moved only 784,531 people into new districts, or 12.1% of the population of the state. Abrams Intervenors' Memorandum in Response to Submission of Additional Demographic Evidence by Defendants Miller, Howard & Cleland, November 27, 1995 letter from Linda Meggers.

In devising its plan the court, by its own admission, "subordinated" protection of incumbents "to other considerations." J.S.App. 18. It moved the incumbent in the Eleventh District to the Fourth District, the incumbent in the Second District to the Third District, and the incumbent in the Eighth District to the Second District. The effect of these changes was to create potential contests between incumbents in Districts Three and Four. J.S.App. 18-9. Two of the three dislocated incumbents were black, and only these two were placed in new districts with other incumbents.

The court's plan contained a total deviation among districts of 0.35%. J.S.App. 39. As noted *supra*, alternative plans proposed by the parties contained lower deviations, *i.e.*, the Illustrative Plan proposed by the United States with a deviation of only 0.19%, and appellants' ACLU1A plan with a deviation of 0.29%.

The district court justified the deviation in its plan by deferring to the state's preference "for not splitting counties outside of the metropolitan area," J.S.App. 8, and because it wished to maintain "communities of interest." J.S.App. 11. In addition, the court noted that "no precise count of a district's population can be made using 1900 data." J.S.App. 12.

Judge Edmondson did not file a written dissenting opinion. During the August 22, 1995 hearing, however, he indicated in comments from the bench that the duty of a federal court was "in each instance to make the least amount of changes, the fewest amounts of changes, and the least dramatic changes, possible" to bring a plan into compliance with the Constitution. T., Aug. 22, 1995, p. 29.

In his view, the court did not have a license to "just redraw Georgia." *Id.* at 36.

On January 8, 1996 the court denied appellants' motion for reconsideration and an evidentiary hearing to challenge the court ordered plan. Appellants filed their notice of appeal on January 11, 1996. J.S.App. 46. The district court denied appellants' application for a stay pending appeal on January 26, 1996. This Court denied appellants' application for a stay on February 6, 1996. *Abrams v. Johnson*, 116 S.Ct. 899 (1996). After noting probable jurisdiction, the Court denied appellants' renewed application for a stay on June 7, 1996. *Abrams v. Johnson*, A-982.

SUMMARY OF ARGUMENT

The district court abused its equitable powers in completely redrawing the congressional map of Georgia. The powers of the federal courts must be adequate to the task of fashioning remedies for violations, but those powers are limited. Any remedy must be related to the conditions that are found to offend the Constitution.

In the area of redistricting, deference by federal courts to state policy choices is especially compelling. That is true because the states have primary responsibility for apportionment. When a district court must act in the legislature's stead, it must accomplish its task circumspectly, and in a manner that is free from any taint of arbitrariness or discrimination.

The district court ignored the state's traditional interest in preserving the core of existing districts. It completely relocated the Eleventh District and placed it in the northeast Atlanta corridor because it felt that was a better location for the district. The court also drastically reconfigured other districts, including the Third, the Eighth, and the Tenth.

The court's plan moved incumbents and pitted them against each other in a number of districts in disregard for the state's traditional policy of avoiding contests between incumbents. Two of the three dislocated incumbents were black, and only these two were placed in new districts with other incumbents.

The court's plan shifted nearly a third of the state's population into new districts. Least-change plans proposed by the parties and *amici* showed that it was possible to draw far less disruptive plans that at the same time cured the constitutional defects in the prior plan.

The court eliminated two of the three majority black districts in the existing plan, despite its acknowledgment of the legislature's decision to create a second majority black district after the 1990 census. The court's justification for refusing to draw a second majority black district was that Georgia's minority population was not geographically compact. The legislature, however, in enacting its first plan was of the view that the black population *was* sufficiently compact to constitute a majority in a second congressional district.

Proposed remedial plans were also submitted by the parties and *amici* which showed that a compact second majority black district can be drawn in Georgia while

adhering to the state's traditional districting principles. As long as a state does not subordinate traditional redistricting principles to race, it may intentionally create majority-minority districts, and may otherwise take race into consideration, without being subjected to strict scrutiny.

The court's plan violates Section 2 of the Voting Rights Act. Blacks in Georgia are geographically compact. As appears from various plans submitted to the district court, it is clearly possible to draw two reasonably compact majority black congressional districts in the state. Blacks are also politically cohesive, while their preferred candidates are usually defeated by whites voting as a bloc. As the lower court found, a district containing approximately 55% of black registered voters was necessary to avoid dilution of minority voting strength.

The district court's plan is retrogressive in violation of Section 5. The court's plan reduced the number of majority black districts from the levels in the third legislative plan (which had three of eleven) and the first legislative plan (which had two of eleven), to only one of eleven in a state that is 27% black. Minorities admittedly have fewer electoral opportunities under the court ordered plan than under any of these pre-existing plans.

The court used the 1982 plan as a benchmark for measuring retrogression. The 1982 plan was not only malapportioned but contained ten districts while the 1992 plan contains eleven. The ten seat 1982 plan by definition cannot serve as a reasonable benchmark by which to evaluate the court's eleven seat plan. The most appropriate benchmarks for determining retrogression are either

the state's initial eleven seat plan containing two majority black districts, or the state's policy and goal of creating two majority black districts. Using either of these benchmarks, the court ordered plan would violate the retrogression standard of Section 5.

The court's plan does not comply with one person, one vote. Congressional redistricting is held to even stricter standards than legislative redistricting. The total deviation among districts in the district court's plan is 0.35%. Plans with lower overall deviations were submitted to the court by the United States (0.19%) and by appellants (0.29%). Other district courts have had no difficulty in drafting or approving plans with zero deviations.

ARGUMENT

I. The District Court Abused Its Equitable Powers

The powers of the federal courts must be adequate to the task of fashioning remedies for constitutional violations, but those powers "are not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). Any remedy must be related to "the condition alleged to offend the Constitution." *Milliken v. Bradley*, 418 U.S. 717, 738 (1974). *See Missouri v. Jenkins*, 115 S.Ct. 2038, 2058 (1995) (federal courts do not have "a blank check to impose unlimited remedies upon a constitutional violator") (O'Connor, J., concurring).

In the area of redistricting, deference by federal courts to state policy choices is especially compelling. That is true because "the Constitution leaves with the

States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 113 S.Ct. 1075, 1081 (1993). *See* Art. I, § 4, cl. 1, Constitution of the United States ("[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations"). *See also Chapman v. Meier*, 420 U.S. 1, 27 (1975).

While an elected legislature is situated to identify and reconcile traditional state policies, "[t]he federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Connor v. Finch*, 431 U.S. 407, 415 (1977). When a district court must act in the legislature's stead, its "task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.' " *Connor v. Finch*, 431 U.S. at 415, *quoting Roman v. Sincock*, 377 U.S. 695, 710 (1964).

> A court
>
> should follow the policies and preferences of the State, expressed in statutory and constitutional provisions or in reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution.

White v. Weiser, 412 U.S. 783, 795 (1973). Because states derive their reapportionment authority from independent provisions of state and federal law, "federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Voinovich*

v. Quilter, 113 S.Ct. 1149, 1157 (1993). The decisions and judgments of a state legislature "in pursuit of what are deemed important state interests . . . should not be unnecessarily put aside in the course of fashioning relief." *White v. Weiser*, 412 U.S. at 796.[5]

These principles are exemplified by *Upham v. Seamon*, 456 U.S. 37 (1982). There, the Attorney General objected under Section 5 to two congressional districts in Texas. The district court proceeded to resolve the objections to the districts but in addition devised its own plan for four

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[5] One of the reasons federal courts should act circumspectly and adhere to state legislative policy choices where possible is to avoid even the appearance of partisan or other bias. The "drastic changes" approach of the district court in this case has, unfortunately, given rise to speculation that the plan was driven by partisan bias favoring Democrats at the expense of Republicans. J.S.App. 6. *See* Jeff Dickerson, "At Christmas, black party loyalty doesn't pay off," The Atlanta Journal, December 20, 1995 ("The judges – both appointed by Democrats, coincidentally – did away with two of the state's three majority black districts, balkanizing the black vote in a way that benefits white Democrats"); Kevin Merida, "ACLU to Appeal Decision Remapping Ga. Districts," Washington Post, December 15, 1995 (quoting the chair of the Georgia Democratic Party that "[t]he changes that were made favored us in virtually every district"); Mike Christensen, "Reactions to the plan are all over the map," Atlanta Journal Constitution, December 14, 1995 (quoting Rep. John Linder that " '[i]t appears that the two Democratic judges tried to draw a map for white Democrats . . . [w]hat [Georgia House Speaker] Tom Murphy couldn't get done on the floor of the Legislature he got the judges to do for him' "). Public trust and confidence in the impartiality of the judiciary cannot but be undermined by the unnecessary breadth of the redistricting by the district court in this case.

other districts as to which there had been no objection. 456 U.S. at 40. In vacating the decision, the Court noted that "[t]he only limits on judicial deference to state apportionment policy . . . were the substantive constitutional and statutory standards to which such plans are subject." 456 U.S. at 42. In fashioning a court ordered remedy, therefore, a district court may not reject state policy more than is necessary "to meet the specific constitutional violations involved." *Id.* In remanding the case for further proceedings, the Court concluded that:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of 'reconciling the requirements of the Constitution with the goals of state policy.' *Connor v. Finch, supra,* at 414, 97 S.Ct. at 1833. An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the Dallas County reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature.

456 U.S. at 43.

In light of *Upham*, the district court's remedial powers in this case were limited to curing any constitutional defects in the Second and Eleventh Districts. Far from following *Upham*, the district court redrew the entire congressional map for the state of Georgia, proceeding by

its own admission as if the state had adopted "no plans." J.S.App. 7.

A. Ignoring District Cores. The district court ignored the state's traditional, longstanding, and explicitly articulated interest of "preserving the core of existing districts." *Miller v. Johnson*, 115 S.Ct. at 2483. It completely relocated the Eleventh District and placed it "in the Northeast Atlanta corridor out to the northeast Georgia state line," where it would have an "urban/suburban flavor." J.S.App. 13-4. The court justified this new location of the district on the grounds that it was in an area of anticipated future growth, and "[t]he road net, the area's commerce, its recreational aspect, and other features produce a district with a palpable community of interests." J.S.App. 14. Even assuming all of that to be true, it provides no basis for the court substituting its own judgment for that of the legislature about where the district should be located in the state, particularly where a district can be drawn southeast from South DeKalb County that cures the constitutional defects identified by the Court and which is based upon the state's traditional redistricting principles.

Elaborating on its "road net" rationale for relocating the Eleventh District, the district court explained that the new district follows a progression of counties that "have Interstate Eighty-Five as a very real connecting cable." J.S.App. 14. Ironically, it was the configuration of the Twelfth Congressional District in North Carolina along the very same interstate that drew the sharpest criticism of that district. *See Shaw v. Reno*, 113 S.Ct. 2816, 2821, 2825, 2832 (1993) (describing the Twelfth District as being "unusually shaped," "bizarre on its face," and "irrational

on its face" because for much of its length it closely followed "the I-85 corridor"). Constructing a district along a major highway can, therefore, depending on the redistricting outcome one favors, be evidence of bizarreness and irrationality, or "a very real connecting cable." J.S.App. 14.

As the court's "road net" analysis demonstrates, a resourceful map maker can justify *any* plan, particularly one drawn at the congressional level, based upon "communities of interests," including those similar to or different from the ones identified by the district court. It would be quite impossible to draw a district in Georgia containing some 589,000 people without including a substantial number – or an infinity – of communities of interests, *e.g.*, business people, working class families, poor people, members of the middle class, church goers, sports fans, high school graduates, high school dropouts, people and neighborhoods concerned about crime prevention and improving public education, or individuals and groups concerned about the national debt, the space program, international terrorism, and ethnic cleansing and genocide, etc. Certainly these "communities of interest" have as much claim to congressional representation as an area's "road net," or its "commerce," or its "recreational aspect," communities of interest relied upon by the district court to justify its relocation of the Eleventh District. J.S.App. 22.

In reality, "community of interests" is an amorphous and illusive concept. One can define it in any way one chooses, which is one reason why the federal courts should leave the definition to state legislatures. Certainly a federal court, whose equitable powers properly extend

only to curing identifiable constitutional and statutory defects, has no warrant gratuitously to substitute its own definition of what a community of interests is for that of the legislature. *White v. Weiser*, 412 U.S. at 795 ("[i]n fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary' "), *quoting Whitcomb v. Chavis*, 403 U.S. at 160. The district court's choice of communities of interest was exactly the arbitrariness that *Roman v. Sincock*, 377 U.S. at 710, forbade.

The district court also drastically reconfigured the Third and Tenth Districts. It moved the Third District from the center of the state to its western edge. It relocated the Tenth District, moving it south to fill the void created by moving the Eleventh District to the Northeast Atlanta corridor.

The court created an Eighth District that runs from the Florida line to the metropolitan hub counties of Lamar, Upson, and Monroe, and included in one sprawling district the smallest county in the state, Echols (population 2,334), with one of the largest metropolitan counties in the state, Bibb (population 149,967). To use the words of this Court in invalidating the Eleventh, the Eighth District includes areas that are "miles apart in distance and worlds apart in culture." *Miller v. Johnson*, 115 S.Ct. at 2484. The Eighth is the kind of "geographic monstrosity" criticized by the majority in *Miller*. *Id.*

The willingness of the district court to draw the kind of districts in its own plan that both it and this Court condemned in the plan drawn by the state indicates that

the district court applied a dual standard in redistricting. Moreover, it is a dual standard that is impermissibly based upon race, for it measures majority black districts by one set of size and compactness criteria and majority white districts by another. The use of such a dual standard inevitable calls into question the "arbitrariness" of the district court's plan, *Roman v. Sincock*, 377 U.S. at 710, and contravenes the assurance given by this Court that majority-minority districts are not to be treated "*less* favorably" than those that are majority white. *Miller v. Johnson*, 115 S.Ct. at 2497 (O'Connor, J., concurring).

B. Maximum Disruption. The court's plan moved incumbents and pitted them against each other in a number of districts, again in disregard for the state's traditional and stated policy of "avoiding contests between incumbents." *Miller v. Johnson*, 115 S.Ct. at 2483. Two of the three dislocated incumbents were black, and only these two were placed in new districts with other incumbents.

The court's plan shifted nearly a third of the state's population into new districts. Least-change plans proposed by the parties and *amici* showed that it was possible to draw far less disruptive plans that at the same time cured the constitutional defects in the prior plan. Abrams Intervenors' Memorandum in Response to Submission of Additional Demographic Evidence by Defendants Miller, Howard & Cleland, November 27, 1995 letter from Linda Meggers. Under appellants' ACLU1A plan, only 12.1% of the state's population was placed in a different district.

C. Destroying Majority Black Districts. The court also eliminated two of the three majority black districts in

the existing plan, despite its acknowledgment of the legislature's decision to create a second majority black district after the 1990 census. J.S.App. 22 n.16. The first plan enacted by the legislature *prior* to any involvement by the Department of Justice contained a second majority black district (the Eleventh) running Southeast from DeKalb County. *Miller v. Johnson*, 115 S.Ct. at 2483. That plan necessarily reflected the legislature's, not DOJ's, reapportionment policies and goals.

In their brief in this Court in *Miller v. Johnson*, the state repeatedly stressed "the undisputed consensus of all the legislators involved – both white and black, Republican and Democrat – that the first plan was reasonable." *Miller v. Johnson*, No. 94-631, Brief of Appellant Miller et al., p. 18. There is no evidence that the first plan was based predominantly upon race or that the state subordinated its traditional redistricting principles to race in the construction of the plan. Again, in its brief, the state said that:

> It is undisputed that the General Assembly as a whole found the initial [1991 congressional redistricting] plan enacted to be reasonable. It was not perceived as a 'racial gerrymander.' . . . *There is, in fact, no evidence that any legislator or reapportionment staffer ever believed the initial plan to be offensive as a racial gerrymander.*

Miller v. Johnson, No. 94-631, Brief of Appellants Miller *et al.*, p. 49 (emphasis in original).

In addition, the plaintiffs in *Miller v. Johnson*, never contended in the district court that the first or second congressional redistricting plans were unconstitutional, and introduced no evidence that they were. In response to a question from the district court, the plaintiffs' lawyer responded that "I don't think that we have a position on the

first two plans because they never went to law." *Johnson I*, T.Vol.II,23. Nor was there any finding by the district court that the first plan enacted by the legislature was unconstitutional.

The record itself refutes any contention that the Eleventh District was initially drawn "solely" on the basis of race. The first plan excluded "a sizable black population in Baldwin County," *Johnson I*, T.Vol.II,21 (Testimony of Linda Meggers), as well as "a sizable black population of Chatham [County]". *Id.* at 25. Had the construction of the Eleventh District been driven solely by race it would have included these areas.

The speaker of the house said that the Eleventh District as drawn in the first plan "suited me," was "obviously" acceptable, and denied that it was "a racial gerrymander." *Johnson I*, T.Vol.II,81. The chair of the house reapportionment committee similarly testified that in enacting the first congressional plan, "[we] thought we had done pretty well." *Johnson I*, T.Vol.III,252 (Testimony of Bob Hanner). The state complied with the Voting Rights Act, as well as followed its traditional redistricting principles, *i.e.*, "we kept cities and counties intact." *Id.*

The court's justification for refusing to draw a second majority black district was that "Georgia's minority population is not geographically compact." J.S.App. 22. The legislature, however, in enacting its first plan was obviously of the view that the black population *was* sufficiently compact to constitute a majority in a second congressional district.

The state's demographer also testified that the Eleventh District in the first plan contained fewer counties than many other Georgia congressional districts, and in terms of its size and length was "within the range of districts that the state

has created in the past." T., Oct. 30, 1995, p. 444. Proposed remedial plans submitted by the parties and *amici*, *e.g.*, the Illustrative Plan, ACLU1A, and Amicus R, also showed that a compact second majority black district can be drawn in Georgia while adhering to the state's traditional districting principles.

While this Court held in *Miller* that the legislature's *third* post-1990 plan – adopted after the Attorney General refused to preclear the first two plans – is unconstitutional, the Court never held or suggested that the first plan is unconstitutional. The first plan enacted by the state was based upon the state's traditional districting principles and would not trigger strict scrutiny under *Miller v. Johnson*, 115 S.Ct. at 2497 ("[t]o invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices") (O'Connor, J., concurring). It was error for the district court to ignore the judgment of the legislature, especially when, as noted *infra*, doing so diluted the voting strength of a "community defined by actual shared interests." *Miller v. Johnson*, 115 S.Ct. at 2475.

D. Unnecessary Speculation. The district court attempted to distinguish *Upham* by claiming that the existing plan "does not represent the goals of Georgia's historic policies nor the state legislature's true intent." J.S.App. 4. However, the "policies" and "true intent" of the state *were* represented in the first plan enacted by the legislature *prior* to any involvement by the Department of Justice.

The district court's defense of its "drastic changes" approach based upon speculation about what "the legislature might have done had it not been for the DOJ's

subversion of the redistricting process," J.S.App. 13, is therefore misplaced. One does not have to resort to speculation; in enacting the first plan, we know what the legislature *actually did*. Unless the state's legislative policy and goal of a second majority black district was unconstitutional, the district court was not free to ignore it. This Court has never held or suggested that the creation of a majority black district is *per se* suspect. *See Bush v. Vera*, 64 U.S.L.W. 4452, 4455 (1996) ("as we have emphasized . . . the decision to create a majority-minority district [is not] objectionable in and of itself"). As long as a state does not subordinate traditional redistricting principles to race, it "may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny." *Id.* at 4464 (O'Connor, J., concurring). *See DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D.Cal. 1994) (strict scrutiny did not apply to a deliberately created compact majority-minority district), *aff'd*, 115 S.Ct. 2637 (1995). Nor did the Court hold or suggest that Georgia's first plan was unconstitutional or in violation of the Voting Rights Act or subject to strict scrutiny. Insofar as the Voting Rights Act is concerned, the Court acknowledged that the first plan was " 'ameliorative' and could not have violated § 5's non-retrogression principle." *Miller v. Johnson*, 115 S.Ct. at 2492.

In summary, in implementing its plan the district court: (1) proceeded as if the state had previously enacted "no plans;" (2) ignored the state's traditional interest in preserving the cores of existing districts; (3) substituted its own judgment of what constituted a "community of interests" for that of the state; (4) applied a dual standard based upon race that measured majority black districts by

one set of size and compactness criteria and majority white districts by another; (5) subordinated the state's interest in protecting incumbents; (6) disproportionately disadvantaged black incumbents; (7) caused maximum disruption by shifting nearly a third of the state's population into new districts; and, (8) destroyed two of the three majority black districts, despite the legislature's clearly stated objective of creating two majority black districts.

By contrast, plans submitted by appellants, the United States, and *amici* showed that plans could have been adopted which cured the constitutional defects in the existing plan, but at the same time caused minimum disruption, respected the state's traditional interest in preserving the cores of existing districts, respected the state's judgment of what constituted a "community of interest," applied the same size and compactness criteria to majority black as to majority white districts, respected the state's interest in protecting incumbents, did not disproportionately disadvantage black incumbents, and respected the legislature's objective of creating two majority black districts.

The district court's plan is not the kind of minimally disruptive plan based upon the state's traditional redistricting principles that the court was obligated to adopt. *Upham v. Seamon*, 456 U.S. at 43. Nor was the district court at liberty to brush the state's policies aside and substitute its own judgment that "Georgians deserve a better fate" than to have two majority black congressional districts. J.S.App. 22. *See Whitcomb v. Chavis*, 403 U.S. at 161.

II. The Court's Plan Violates Section 2

Despite its conclusion to the contrary, the court ordered plan dilutes minority voting strength in violation of Section 2. In determining whether a challenged voting practice violates Section 2, a court must decide if the practice "results in a denial or abridgement of the right . . . to vote on account of race or color," *i.e.*, whether minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The legislative history of Section 2, particularly the Senate Report, indicates that "a variety of factors, depending upon the kind of rule, practice, or procedure called into question," are relevant in determining if a plan "results" in discrimination. S. Rep. No. 417, 97th Cong. 2d Sess. 28-9 (1982). Typical factors include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.

> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. See Thornburg v. Gingles, 478 U.S. 30, 36-7 (1986) (listing the Senate factors).

There is no requirement that any particular number of the Senate factors be proved, or that a majority of them point one way or the other. Instead, Section 2

> requires the court's overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson* and *Burns*, 'minimized or canceled out.'

S. Rep. No. 417 at 29 n.118. *Accord, Johnson v. De Grandy*, 114 S.Ct. 2647, 2657 (1994) (in resolving claims of vote dilution, courts must examine "evidence in the totality of circumstances").

The analysis of the Senate Report was approved and applied by the Court in *Thornburg v. Gingles*, 478 U.S. at 43-5. In *Gingles*, a challenge to multimember legislative

districts in North Carolina, the Court analyzed the statutory language and legislative history of Section 2 and simplified the application of the Senate factors. It held that:

> the essence of a § 2 claim is that a certain electoral law, practice, or structure, interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.

478 U.S. at 476.

According to the Court, the most important considerations in determining a Section 2 violation are: (1) whether the minority group is sufficiently large and geographically compact to constitute a majority in one or more single member districts; (2) whether the minority is politically cohesive, *i.e.*, tends to vote as a bloc; and, (3) whether the majority also votes as a bloc "usually to defeat the minority's preferred candidate." 478 U.S. at 50-1. The other factors listed in the Senate report "are supportive of, but *not essential to*, a minority voter's claim." 478 U.S. at 48 n.15 (emphasis in original).

The *Gingles* formulation has been regularly applied by the lower federal courts, and its constitutionality has been assumed or affirmed by a majority of this Court. *See Voinovich v. Quilter*, 113 S.Ct. at 1155; *Bush v. Vera*, 64 U.S.L.W. at 4464 ("[w]e should allow States to assume the constitutionality of § 2 of the Voting Rights Act, including the 1982 amendments") (O'Connor, J., concurring); 4481 ("compliance with § 2 of the Voting Rights Act is a compelling state interest") (Souter, J., dissenting); 4476

("a state has a compelling interest in complying with § 2 of the Voting Rights Act") (Stevens, J., dissenting).

This Court has also made it clear that Section 2 standards apply to court ordered redistricting plans. In *SRAC v. Theodore*, 113 S.Ct. 2954 (1993), involving legislative and congressional redistricting in South Carolina, the Court vacated and remanded "for further consideration in light of the position presented by the Solicitor General in his Brief for the United States." The Solicitor General's position was that "the court was required to afford all parties the opportunity to present specific Section 2 objections before imposing those plans for use in future elections." *SRAC v. Theodore*, No. 92-155 (S.Ct.), Brief for the United States as Amicus Curiae, p. 18. *See also Winter v. Brooks*, 461 U.S. 921 (1983), *vacating and remanding Jordan v. Winter*, 541 F.Supp. 1135 (N.D.Miss. 1982) (remanding a court ordered redistricting plan "for further consideration in light of Section 2 of the Voting Rights Act"); *Edge v. Sumter County School District*, 775 F.2d 1509, 1510 (11th Cir. 1985) ("the district court could not validly adopt a reapportionment plan without determining whether the plan complied with Section 2 of the Voting Rights Act").

The evidence shows that blacks in Georgia are geographically compact. As appears from various plans submitted to the district court, *e.g.*, the Illustrative Plan, ACLU1A, and Amicus R, as well as the first plan enacted by the legislature, it is clearly possible to draw two reasonably compact majority black congressional districts in the state.

Proof of the second and third *Gingles* factors, *i.e.*, that the minority is politically cohesive and that its preferred

candidates are usually defeated by whites voting as a bloc, depends primarily upon proof of racial bloc voting. 478 U.S. at 56. Consistent with the evidence that voting in Georgia is polarized and that blacks are politically cohesive, the district court found "a significant drop in the probability of a black candidate being elected as the black percentage of registered voters declines to fifty percent." J.S.App. 26. For that reason, the court held that a district containing approximately 55% of black registered voters was necessary to avoid dilution of minority voting strength. *Id.* at 26.

The evidence also shows, as the district court indicated, *see* J.S.App. 26, that the racial bloc voting is legally significant in that the majority votes as a bloc in the majority white jurisdictions "usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-1. In addition, the totality of the circumstances, including evidence of past discrimination and its continuing effects, strongly supports a finding that the court's plan would result in discrimination in violation of Section 2. *Johnson v. De Grandy*, 114 S.Ct. at 2660. While it refused to grant appellants a hearing on the issue, the court's plan, which creates only one majority black district, violates Section 2 of the Voting Rights Act. The court's finding that its plan does not violate Section 2 is clearly erroneous.

A. No Deference Is Due the Court's Ruling. Any deference ordinarily due the district court's Section 2 finding under the clearly erroneous rule is undermined, not only because the court refused to hold a Section 2 hearing on the adequacy of its plan, *see, e.g., SRAC v. Theodore*, but because it barred private intervention to defend the constitutionality of the Second District. By

doing so, it pretermitted the development of a full Section 2 record.

The basis for denying private intervention was that the interests of any intervenors was adequately represented by the state. J.S.App. 42-3. Defendant Murphy, however, stipulated that the Second District was unconstitutional. The remaining state defendants did not argue that a majority black Second District was needed to eliminate the effects of past discrimination in voting, nor to comply with Section 2 of the Voting Rights Act. By their own admission, they presented no witnesses and took no part in the examination of witnesses. Finally, none of the state defendants appealed the decision of the district court invalidating the Second District. It is clear that appellants' interests were not adequately represented at trial, and that as a result a full Section 2 record was not developed.

Deference under the clearly erroneous rule is accorded on the assumption that the trial court has had an opportunity "to evaluate the credibility of witnesses and to weigh the evidence." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 (1982). But where, as here, the state presented no witnesses and the trial court based its findings upon an inadequately developed record, a reviewing court should not be bound by the clearly erroneous standard. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (rationale for the clearly erroneous rule is that the trial court is in a position "to appraise and weigh the evidence"). No deference is due the finding of the district court that its plan complied with Section 2.

III. The Plan Is Retrogressive in Violation of Section 5

While federal court ordered plans are not themselves subject to Section 5 preclearance, they nevertheless must comply with Section 5 standards. *McDaniel v. Sanchez*, 452 U.S. 130, 138, 148-49 (1981); S.Rep. No. 295, 94th Cong. 18-9 (1975) (in fashioning a remedial plan a "court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedent developed in Section 5 cases"). Court ordered plans must, therefore, avoid retrogression under the "effect" standard of Section 5. J.S.App. 50-2.

In *Beer v. United States*, 425 U.S. 130, 141 (1976), the Court defined retrogression prohibited by Section 5 as a change in voting that diminishes the voting strength of a covered minority. *See City of Lockhart v. United States*, 460 U.S. 125, 135 (1983) (retrogression is determined by whether or not minorities have the "same" electoral opportunities before and after a voting change).

The court ordered plan in this case reduced the number of majority black districts from the levels in the third legislative plan (which had three of eleven) and the first legislative plan (which had two of eleven), to only one of eleven in a state that is 27% black. Minorities admittedly have fewer electoral opportunities under the court ordered plan than under any of these pre-existing plans.

The court in *Johnson I*, 864 F.Supp. at 1369, acknowledged that by invalidating the Eleventh District it was "depriving black citizens" of electoral opportunities. The court ordered plan which destroyed a second majority

black district imposed an even greater deprivation. The court ordered plan is plainly retrogressive.

The court took the position that its plan was not retrogressive "when compared to the 1982 plan." J.S.App. 27. This comparison, however, overlooks the fact that the 1982 plan contained ten districts while the 1992 plan contains eleven. To use the well-worn phrase, comparing the two plans is like comparing apples and oranges. The ten seat 1982 plan by definition cannot serve as "a reasonable benchmark by which to evaluate" the court's eleven seat plan. *Holder v. Hall*, 114 S.Ct. 2581, 2586 (1994).

Even assuming the 1982 plan were a proper benchmark, the court ordered plan would still be retrogressive. Under the 1980 plan one (10%) of the ten districts was majority black. Under the court's plan only one (9%) of the eleven districts is majority black. Blacks would not have the "same" electoral opportunities under a plan in which they were a majority in one of eleven districts than a plan in which they were a majority in one of ten districts. *City of Lockhart v. United States*, 460 U.S. at 135.

The district court's benchmark, the 1982 plan, is also malapportioned and therefore unconstitutional. *Karcher v. Daggett*, 462 U.S. 725, 732 (1983). There is no state or federal policy that is advanced by using an admittedly unconstitutional plan as a benchmark, particularly where, because of the intervening increase in size of the state's congressional delegation, other more appropriate benchmarks exist. The most appropriate benchmarks for determining retrogression are either the state's initial eleven seat plan containing two majority black districts,

or the state's policy and goal of creating two majority black districts. Using either of these benchmarks, the court ordered plan would violate the retrogression standard of *Beer*.

The plan first adopted by the state in 1991 was not legally enforceable as a matter of federal law because it was objected to under Section 5. *Clark v. Roemer*, 500 U.S. 646, 654 (1991) (absent "extreme circumstance" an objected to voting practice is unenforceable). However, the plan did embody the state's redistricting policy of creating two majority black districts which was *not* objected to by the Attorney General. That policy can provide a benchmark for determining retrogression. *Upham v. Seamon*, 456 U.S. at 42 (a court must defer where possible to "state policy choices").

Moreover, this Court held in *Miller v. Johnson*, 115 S.Ct. at 2492, that the first plan enacted by the state "could not have violated § 5's non-retrogression principle." Given the Court's imprimatur, it is entirely appropriate to use the 1991 plan containing two majority black districts as the benchmark for determining retrogression. Using an appropriate benchmark, the court ordered plan violates Section 5.

IV. The Plan Does not Comply with One Person, One Vote

Because congressional redistricting is governed by Article I, Section 2 of the Constitution, "absolute population equality [is] the paramount objective." *Karcher v. Daggett*, 462 U.S. at 732. Federal courts, moreover, are held to even stricter standards in redistricting than legislatures. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978).

The total deviation among districts in the district court's plan is 0.35%. J.S.App. 39. Plans with lower overall deviations were submitted to the court by the United States, *i.e.*, the Illustrative Plan with a deviation of 0.19%, *United States v. Johnson*, No. 95-1460, J.S.App. 45a, and by appellants, *i.e.*, Plan A with a deviation of 0.29%. J.App. 199. Given modern computer technology, there is no reason why there should be any deviation in a court ordered congressional redistricting plan. Other district courts have had no difficulty in drafting or approving plans with zero deviations. *See Hastert v. State Board of Elections*, 777 F.Supp. 634, 644 (N.D.Ill. 1991) (adopting a plan containing "mathematically perfect population equality"), and *Burton v. Sheheen*, 793 F.Supp. 1329, 1367-68 (D.S.C. 1992) (court ordered plan containing zero deviation), *vacated and remanded on other grounds sub nom. SRAC v. Theodore*.

The district court attempted to justify the deviation by deferring to the state's alleged preference "for not splitting counties outside of the metropolitan area," J.S.App. 8, and because the 1990 census was stale. J.S.App. 12. *Karcher v. Daggett*, 462 U.S. at 738, rejected a similar attempt to "explain population deviations on the basis of flaws in census data." It also held that to justify deviations based upon asserted state interests such as preserving political boundaries, a state would have to do more than rely on "general assertions." 462 U.S. at 741. The general assertions made by the district court in this case do not begin to meet the standard of specificity demanded by *Karcher* to excuse compliance with the constitutional standard of absolute population equality.

CONCLUSION

For the above reasons, this Court should reverse the decision of the lower court.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 19 1996
OFFICE OF THE CLERK

Nos. 95-1425 and 95-1460

In the Supreme Court of the United States

OCTOBER TERM, 1996

LUCIOUS ABRAMS, JR., ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

JOINT APPENDIX

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Jurisdictional Statements Filed:
March 7 and March 12, 1996
Probable Jurisdiction Noted: May 20, 1996

212 pp

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JOINT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE SOUTHEREN DISTRICT OF GEORGIA

AUGUSTA DIVISION

CIVIL ACTION NO. CV 194-008

LUCIOUS ABRAMS, JR., ET AL., APPELLANTS

v

DAVIDA JOHNSON, ET AL.

A. RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
7/12/95	243	NOTICE of the State of Georgia's Calling of a Special Session of the General Assembly in Which to Enact a Remedial Reapportionment Plan by State dfts Zell Miller, Pierre Howard, Thomas Murphy, Max Cleland.
8/2/95	251	ORDER setting hearing on redistricting remedies at Augusta on 8/22/95 at 9 a.m., inviting original parties to submit suggestions not to exceed 25 pages no later than 8/15/95, and informing parties that all pending motions and matters relating to costs and atty fees will be considered (signed by Judge Dudley H. Bowen Jr.), copies served. [Entry date 08/03/95]
8/14/95	258	PLAINTIFFS' SUBMISSION on Remedy Per Court Order of August 2, 1995 [edit date 08/14/95]
8/14/95	260	MOTION by Abrams intervenors for Reconsideration of [251-1] order dtd 8/2/95

to allow intervenors to submit remedies for consideration, and to stay Ct.'s order of 8/2/95 to allow the Ga Gen Assembly to complete congressional redistricting with brief in support. [Entry date 08/15/95]

8/15/95 262 SUBMISSION of Defendant Thomas B. Murphy in Response to the Court's Invitation to Submit Suggestions as to Remedy.

8/15/95 267 MOTION by United States to Vacate [251-1] order of 8/2/95 setting hearing on redistricting remedies at Augusta on 8/22/95 to allow for a legislative remedy with brief in support. [Entry date 08/16/95]

8/15/95 271 RESPONSE by dfts Miller, Howard, Cleland to ct's 8/2/95 [251-1] order setting hearing on redistricting remedies. [Entry date 08/16/95]

8/17/95 274 AMENDED BRIEF of Amici Curiae by John Lewis and Newt Gingrich.

8/22/95 — Motion hearing held * * *. All pending motions to intervene DENIED; to appear amicus curiae GRANTED for the purpose of making written submissions, DENIED for purpose of making oral arguments or participating in open Court; * * * [Entry date 09/28/95] [Edit date 09/29/95] Motion to dismiss Abrams intervenors is DENIED; Abrams intervenors' motion to be allowed to submit proposed redistricting remedies is GRANTED; all motions to stay or vacate the order calling for today's hearing DENIED; * * * deadline Oct 15 set for new plan; * * *

Abrams intervenors not to participate [in trial on 2d District]; Abrams intervenors' proposal for plan of remedies of 11th Cong. District to be filed within 10 days; Counsel to notify the Court in writing if reapportionment plan not passed. * * * [Entry date 09/28/95] [Edit date 09/29/95]

8/31/95 295 STATUS REPORT by Zell Miller, Pierre Howard, Max Cleland as to proposed Congresional plan [Entry date 09/01/95]

9/1/95 296 PROPOSED REDISTRICTING PLANS by Abrams Intervenors.

9/1/95 297 NOTICE by Thomas Murphy with respect to legislative proceedings (status of special session of Georgia General Assembly)

9/5/95 300 STATUS REPORT by Zell Miller, Pierre Howard, Max Cleland regarding proposed Congressional plan passed by Georgia Senate on 8/31/95 [Entry date 09/07/95]

9/13/95 306 NOTICE by dft Thomas Murphy with respect to legislative adjournment.

9/15/95 307 STATUS REPORT by Zell Miller, Pierre Howard, Max Cleland [Entry date 09/18/95]

9/28/95 — Bench trial set for 10:00 10/30/95 before Chief Judge Edenfield; Circuit Judge Edmondson and District Judge Bowen at Augusta. [Entry date 10/02/95]

10/11/95 319 SUPPLEMENTAL DECLARATION of Selwyn Carter

10/13/95 321 BRIEF on remedy by plffs [Entry date 10/25/95]

10/18/95	325	ORDER directing parties to submit a plan that makes the least chgs, in terms of line drawing, bringing the 11th Dist. into compliance w/US Constitution, and a plan that makes the least chgs, in terms of line drawing, in GA's present congressional plan bringing the 11th and 2d Dists. into compliance w/US Const; the parties are instructed to confer regarding these plans; signed by Judge James L. Edmondson); copies served. [Entry date 10/25/95]
10/20/95	329	ORDER directing parties to submit plans based on first plan that GA submitted to Dept. of Justice for preclearance signed by Judge Dudley H. Bowen Jr.); copies served. [Entry date 10/25/95]
10/20/95 [sic]	—	Bench trial held as to 2d District; ruling reserved; remedy phase to continue on 10/31/95
10/27/95	343	SUBMISSION of dfts Miller, Cleland, and Howard in connection with the issue of remedy.
10/27/95	344	NOTICE of filing minimum change plan and brief by Abrams Intervenors
10/27/95	345	RESPONSE/REMEDY submission by defendant Thomas Murphy to [329-1] order and [325-1] order of 10/17 and 10/20/95.
10/27/95	348	BRIEF on remedy by United States
10/30/95 [sic]	349	BRIEF on remedy by United States
10/[30]-	—	Bench trial held; counsel argument and

31/95		evidence on remedy phase concluded; ruling of the Court reserved; the Court to notify the parties if additional briefing permitted. All evidence from 11th District trial made a part of the record in these proceedings. * * * [Entry date 11/01/95]
11/9/95	363	ORDER directing plffs' counsel to submit proposed plan to be known as plffs' remedy 4X by 11/22/95, comments from each party not to exceed 12 pgs in length (signed by Judge Dudley H. Bowen Jr.); copies served. [Entry date 11/10/95]
11/16/95	368	ORDER inviting parties to submit addit material to indicate chgs in racial composition of DeKalb Co, GA, from the '90 census to present (signed by Judge Dudley H. Bowen Jr. for 3- judge ct); copies served.
11/22/95	369	RESPONSE by United States to plffs' [367-1] response to Ct's order of 11/9/95, plffs' plans remdy 4X and 4X-R
11/22/95	370	RESPONSE/REPLY by Abrams intervenors to [367-1] plffs' response to Ct order of 11/9/95
11/22/95	371	RESPONSE/SUBMISSION of additional demographic evidence by dfts Miller, Howard and Cleland to [368-1] order of 11/16/95
11/22/95	372	REPLY/RESPONSE by amicus John Lewis and amicus Newt Gingrich to plffs' suggested [367-1] response/remedy 4X and 4XR [Entry date 11/27/95]
11/30/95	374	OBJECTION by State dfts Miller,

Howard, Cleland to [369-1] response by US Dept of Justice to plffs' plans 4X and 4XR.

12/1/95 375 REPLY by plffs to [369-1] response by United States, [370-1] response by Karen Watson, William Gary Chambers Sr., G. L. Avery, Lucious Abrams Jr., [372-1] response by Newt Gingrich, John Lewis to court order of November 9

12/1/95 376 RESPONSE memorandum by Abrams intervenors to [371-1] submission of additional demographic evidence by Max Cleland, Pierre Howard, Zell Miller

12/1/95 377 ORDER that Georgia's Second Congressional District is unconstitutional in its current composition; dfts are barred from using it in future congressional elections; (signed by Judge James L. Edmondson for three-judge court); copies served.

12/6/95 378 RESPONSE by United States to [374-1] objection by Cleland, Howard and Miller, and response to [375-1] response by plffs to US submission of plan on 11/22/95 [Entry date 12/07/95]

12/7/95 379 OBJECTION by defendants Miller, Howard, and Cleland to [372-1] reply/response by Amici Curiae Gingrich and Lewis to plffs' suggested remedy 4X and 4XR

12/8/95 380 OBJECTION by plffs to submission of affid of Donald Hill in [372-1] response by Newt Gingrich and John Lewis

12/8/95 381 RESPONSE by United States to [371-1] submission of additional demographic information by Cleland, Howard, Miller

12/13/95 384 RESPONSE of amicus Lewis and Gingrich to [379-1] objection by state dfts Cleland, Howard, Miller to reply of amici to plffs' 4X and 4XR suggested remedy, and response to [380-1] plffs' objection to amici's submission of affid of Donald Hill

12/13/95 385 ORDER redrawing Ga's congressional districting plan; directing that elections for members of the House of Reps of the Congress of the US from the St of GA be conducted in accordance with the plan appended to this Order as Appendices "A" and "B"; motions terminated; signed by three-judge court Edenfield, Bowen and Edmondson; copies served. [Entry date 12/14/95]

1/11/96 397 NOTICE OF APPEAL by Lucious Abrams Jr., G. L. Avery, William Gary Chambers Sr., Karen Watson to Supreme Court of the US from Order dtd 12/13/95, oral ruling on 8/22/95, and Order of 1/8/96; copies served. [385-1] order, [395-1] order [Edit date 01/12/96]

1/11/96 398 MOTION by Lucious Abrams Jr., G. L. Avery, William Gary Chambers Sr., Karen Watson for a Stay pending appeal of Order of Ct entered 12/13/95, permitting '96 primary and general elections to be held under a redistricting plan that does not violate Sec. 2 and 5 of Voting Rights, with brief in support. [Edit date 01/16/96]

1/12/96 401 NOTICE OF APPEAL by dft-intervenor United States to the Supreme Court of the

US from 12/13/95 order of USDC; copies served. [385-1] order [Entry date 01/16/96]

1/26/96 407 ORDER denying Abrams Intervenors' [398-1] motion for a Stay pending appeal of Order of Ct entered 12/13/95 (signed by Judge J. L. Edmondson, Judge B. Avant Edenfield and Judge Dudley H. Bowen Jr.); copies served.

B.
TESTIMONY OF JOSEPH KATZ

[Excerpt from Trial Testimony, 5 T. Tr. p. 63, line 5 to p. 86 line 1,]

Could you tell us, in a more conversational way, what you have found. Essentially, to this point, you've been asked to undermine Dr. Lichtman's work, I think. So tell us why it's not worthy of your credit.

MR. WALBERT: I was just moving to the next point, Your Honor.

HONORABLE JUDGE BOWEN: Tell me, in a more conversational way, about his work, what you find troubling about it?

A (Dr. Katz) The thing I find troubling about it is attempting to estimate election by election the actual voting percentages of the white voters for the white candidate and the black voters for the black candidate.

The data that he has available, that any of us have available, is merely the registration data for the precinct, and the vote data for the precinct. And if we have precincts that are racially mixed in that there's a high percentage of white and black voters, with only the vote data and the registration data, it really isn't possible to dig out what the percentages of racial voting patterns are. And this is magnified when we had very few precincts to work with.

HONORABLE JUDGE BOWEN: Could it be said that any time you have a precinct in which there are two races voting, that there is inevitably some extrapolation in saying who voted and who did not?

A (Dr. Katz) Yes. And to come up with an estimate by necessity, you have to make some additional assumptions about the way the different races voted.

HONORABLE JUDGE BOWEN: You asked, or your [*sic*] mentioned, some impossible results. Are those results that are impossible because of mathematical calculation or because of the methodology used?

A (Dr. Katz) In these cases, it's because of the methodology used. The quadratic relationship that I have demonstrated here, if you try to start fitting linear equations to election data where your precincts fall, say, under 40% black registered voters, then what you're getting in effect are observations that fall somewhat along that line where turnout increases.

And if you then fit a line to that, that will simply shoot the turnout further up, and it never has a chance to adjust back down.

HONORABLE JUDGE BOWEN: Go ahead, Mr. Walbert.

MR. WALBERT: If Your Honor doesn't mind, if I could make an inquiry of the Court, I just found out that one of the copies I was working off of this report when the printer made it apparently left all the exhibits out behind Tab Five, and if I might just to make sure that - - -

HONORABLE JUDGE BOWEN: have - - -

MR. WALBERT: Do you have something?

HONORABLE JUDGE BOWEN: I have charts and graphs on mine.

MR. WALBERT: All right. That's good. I just checked the original one that is marked as an exhibit in evidence as well.

HONORABLE JUDGE BOWEN: Well, Dr. Katz, I know you and Mr. Walbert have talked about this a number of times, and that there are necessary terms of art,

but don't hesitate to speak to us in a conversational way.

Q (Mr. Walbert) Now, Dr. Katz, I want to turn your attention to the ultimate question here in this Court about the likelihood of this kind of evidence, the likelihood of determining whether a black candidate would or would not win in a district of a certain percentage of black voters.

And let me ask you, before we turn to your calculations and your charts, does Dr. Lichtman's methodology allow one to make those kinds of predictions or not?

A Not as methodology to the extent that he merely estimates the racial polarization of voting estimates.

Q All right. Now have you used statistical techniques and standard analytical techniques, Dr. Katz, to try to make determinations of the likelihood of a black candidate prevailing in a black-on-white election in congressional districts of various percentages, using the data that Dr. Lichtman relied upon?

A Yes. That data and some additional data.

Q Okay. Now, are the final determination, before we go back to them in detail, are those the charts that are contained in your report, most of them anyhow, behind Tab Five?

A Yes, they are.

Q Now, I'm going to pick out from here, if I could, what I believe to be the first one of those charts behind Tab Five, and put it up here.

Now using the data that Dr. Lichtman has, and he relied upon, tell the Court what is depicted here by the probability of the black candidate winning an election, what this line and data plot would allow one to use this chart for.

A Okay. What I've tried to represent here is a frequency distribution of the percentage of precincts in all of the elections in the database, in which the black candidate or black candidates had the majority of the vote.

Q Let me just get you, what is, if you wanted to determine, Dr. Katz, the likelihood of a black candidate winning in a black and white race, can this chart, based on the database here, be used for that purpose?

A Yes.

Q How would you do that?

A You would look at the racial composition of the election. Say there's 25 to 30% black registered voters, and the estimate, or the probability that the black candidate would win is the number approximately 20% in this box here.

HONORABLE JUDGE BOWEN: Do you make any assumption about the qualifications of the candidates being equal?

A No. What I'm trying to do is just get an overall probability without limiting it to - - -

HONORABLE JUDGE BOWEN: This is your, this is your projection, not Lichtman's, you're using the Lichtman information. Is that right?

A I'm using the database from Dr. Lichtman, but I'm not using it in the way he used it.

HONORABLE JUDGE BOWEN: All right. This is your graph.

A Yes, sir, that's correct.

HONORABLE JUDGE BOWEN: Okay.

Q (Mr. Walbert) Now, let me, I think, flip a couple

more charts back in your exhibit Tab Five there, I believe this would be the one that is depicted there, Dr. Katz.

In this graph, is it the same kind of presentation of the graphical analysis that was on the previous one?

A Yes, it is. What's changed in the database of elections that I've used to conduct the analysis.

Q How has the database been changed in preparing this particular one, Dr. Katz?

A In this graph, I enhanced the Lichtman database to include the rest of the precincts from the 1990 Governor's primary.

Q Let me stop you there, if I might. When you say you enhanced it to include the rest of the precincts for the 1990 Governor's primary, what do you mean?

A Dr. Lichtman's database did not contain all of the precincts from the 1990 Governor's election, primary election.

Q Was there any apparent methodology to his selecting ones here and there that you could determine at all?

A Not that I could determine.

Q Was Dr. Lichtman's database, put aside the Governor's election, but the rest of the election, was there any geographical limitation to it, or was it from various places all over the State of Georgia?

A Mostly from all over Georgia, although in predominantly white counties, I don't think he had any election, probably because there weren't any black/white elections.

Q All right. Now, his database, in fact, was just

black/white elections; wasn't it?

A That's correct.

Q And was it all democratic primary elections except for a couple of judicial ones?

A There were judicial elections, there was also a few general elections. But I didn't use those.

Q All right, sir. He testified in [h]is deposition that primaries were the ones that were most important to him, Dr. Katz?

A That's my understanding from reading of his deposition.

Q Okay. Is that why you used the primaries when you just said you did?

A Yes.

Q Okay. Now, you have also enhanced Dr. Lichtman's database you say, you just said, by using the rest of the Governor's race that he is a part of. Why is the 1992 Labor Commissioner and the 1992 Second and Eleventh Congressional Districts primary elections in that database as well?

A Those are additional black/white elections in which I can enhance the overall number of precincts to get more precise estimates of the probabilities of the black candidate prevailing.

Q Okay. Now, was the selection of those black/white democratic primary elections consistent with the rules that Dr. Lichtman has purported to you in the development of his database, Dr. Katz?

A Yes.

Q Were you making any independent political judg-

ments about the propriety of elections or just trying to track his method, his selection?

A I was trying to track Dr. Lichtman's selection.

Q Now - - -

HONORABLE JUDGE EDMONDSON: This is a little bit unusual, I guess, because we're hearing a witness whose purpose is to undercut the testimony of another witness who we have not yet heard.

Explain to me why it is, what is the point that you and the government of the United States are disagreeing about that is pertinent to the outcome of this case.

I understand that there is a great deal of disagreement between the State of Georgia and the United States Government about elections in Georgia in general, and other kinds of elections, but, for our case, what is the point of controversy that I should be focusing on here?

MR. WALBERT: I think this, Your Honor, as far as I understand Dr. Lichtman's testimony, when you start going down this kind of a chart here, it is my understanding that his opinions, as he has ventured before, is that you, basically, blacks can't win under some level—and I'm not sure that he has ever quantified that specifically, but I would expect that he would in this case on his testimony—and what we are showing here is that there is a whole lot different probability and pattern, if you will, Judge, than I expect Dr. Lichtman to testify to.

I think he has basically got his concept about, if I've read him correctly in other case, is that there is kind of a step function here. You're in a safe district at some point, and then it rapidly drops off into oblivion and it stays down there. And I think that's the critical question.

HONORABLE JUDGE EDMONDSON: I did understand from reading summaries of these reports that that was where, that there was a difference of view on that point.

What I do not understand is how that matters to this case, since whatever the percentage of voting-age black voters are in the Eleventh District or the Second District is, I gather, not now disputed, and what is the significance of this pointing out that Georgia thinks one thing and the United States Government thinks something else when what is being done here is defending a district that already exists?

MR. WALBERT: Well, to some extent, Your Honor, I guess it's in response to Your Honor's instructions or suggestions, and I think it is an appropriate one, that we are the client of the law in this case in the highest and best sense.

And I think it would be an inappropriate thing to come into this Court and to defend this district to say and to take the position that it is absolutely necessary for [a] black person to have any chance of election that this district being the percentage that it is.

And I think the government's evidence of Dr. Lichtman tends to be in that direction. I don't think, the State has not taken that position. And I think that what we ought to try to do here is just—we have no idea how this is going to turn out, quite frankly, when Dr. Katz started doing it.

We just said, my request to Dr. Katz was: Is there a way that you can statistically, with statistical quantitative methodology, come up with this. With an ideal of a real, what's the likelihood of winning. Because that's the bottom line.

HONORABLE JUDGE EDMONDSON: Am I to understand that the chief reason that you're litigating this point in this case is to prevent this Court from including in its decision in this case some statement that a State black district must have "X" percentage of voters because you don't want to have that precedent hanging over you in other litigation?

MR. WALBERT: I think that's one, that has partly stated one of the two reasons.

HONORABLE JUDGE EDMONDSON: What is the other one?

MR. WALBERT: The other reason really is to show to the Court what the truth is, if you will, the best that we can, in terms of what percentages are appropriate to the likelihood of black candidates winning in a district of different percentages. To me, that is a very germane point in this case, to our way of thinking.

And I think that the State—I guess that there's—Judge if I can focus in real closely, I do think that the intervenors and the government take the position of both sets of intervenors that the State was really absolutely compelled as a matter of law under Section 2 to enact this district. We don't take that position. It's a fundamentally different position.

We take the position that the State having enacted it, giving this type of chart here and these type of results, it was reasonable what the State did in its overall action, and that the Constitution should not strike down what the State did.

But we fundamentally disagree, Your Honor, on the fact that the State was compelled by either the Fourteenth Amendment or Section 2 to do this.

HONORABLE JUDGE EDMONDSON: This just goes to justifying the district if it is found to be bizarre under *Shaw*; is that right?

MR. WALBERT: Yes, I think—yes, I think that's a fair statement, yes sir.

HONORABLE JUDGE EDMONDSON: I understand this much better now.

MR. WALBERT: I appreciate it. Thank you.

Q (Mr. Walbert) I think we've probably covered that exhibit as much as need be, Dr. Katz. Let me ask you, if I might, one last point which goes to the first reason here, and that is this:

Did Dr. Lichtman also include in his database, in his analysis, some of the judicial elections in Georgia, such as some precincts from the Robert Benham race in 1984?

A Yes, he did.

Q Have you made an assessment, Dr. Katz, of all of the database on judicial elections in his database, with all of the precincts, with all of the state-wide precincts for Judge, now Justice, Benham, and Justice Sears-Collins, in all of the four state-wide elections?

A All four state-wide, yes, I have.

Q All right.

A And one of these exhibits shows the probability of the black candidate winning the election if we throw in these additional elections.

Q Now, you used the judicial elections on the local level that Dr. Lichtman had as well; didn't you?

A Yes.

Q Did you make a finding or determination of whether the judicial elections are, in fact, sufficiently similar in their characteristics statistically, to be a reliable indicator in this kind of race, or are they materially different?

A I found that statistically, the judicial elections are materially different.

Q Would it, from a statistical point of view, be inappropriate in your judgment to rely on the one group going back and forth from congressional to judicial or judicial to non-judicial elections?

A Inappropriate in the sense that they seem to be measuring different kinds of elections.

MR. WALBERT: We have no further questions of this witness, Your Honor.

HONORABLE JUDGE BOWEN: Dr. Katz, just one other thing. This graph that you have here, do you present this as a projection of what would, or what might happen, or simply a report of what has happened in the past?

A (Dr. Katz) I presented it as what might happen, since this was the only empirical evidence that I can collect to try and predict the voting pattern in the future.

HONORABLE JUDGE BOWEN: There is no relationship, as far as you know, to the qualifications of the candidate? It is strictly race-based?

A (Dr. Katz) Yes.

HONORABLE JUDGE BOWEN: All right. Ms. Murphy, you may have a question or two.

MS. MURPHY: I have a few minutes of examination

for Dr. Katz. I'm wondering if the Court would like to take it's morning break now, before I start?

HONORABLE JUDGE EDMONDSON: How much time is it going to take?

MS. MURPHY: I expect it will take about twenty minutes.

HONORABLE JUDGE EDMONDSON: What do you think, Judge Bowen? We would like to take the morning recess about 11:00, which gives you about seventeen minutes. Let's see if you can do your twenty in seventeen.

MS. MURPHY: Well, I hope you will give me that extra minute or two if I need it.

HONORABLE JUDGE EDMONDSON: Well, keep in mind that speed is the essence of war.

MS. MURPHY: I hate to think we're actually at war here.

HONORABLE JUDGE BOWEN: Go.

CROSS EXAMINATION BY

MS. MURPHY:

Q Dr. Katz, I'm Donna Murphy, good morning.

A Good morning.

Q And, as you know, I represent the United States. You've read Dr. Lichtman's entire report in this case; is that correct?

A Yes.

Q And the analysis that you were describing that is

set forth on pages 1 to 18 of your report, that analysis is based only on the data that underlies the appendices of Dr. Lichtman's report; is that correct?

A That's correct.

Q So, Dr. Lichtman did, in fact, analyze the elections you were talking about a few minutes ago, the 1990 gubernatorial primary, the 1990, the 1992 labor commissioner primary, and the 1992 congressional election in Districts Eleven and Two, in the table in the body of this report.

A Yes, but they were just partial, it wasn't the complete election.

Q But you analyzed them for the Eleventh Congressional and the Second Congressional Districts?

A Yes.

Q And so, you[r] analysis of the statistical methodology and whatever data issues that you have would only go to the appendices of Dr. Lichtman's report. Is that correct?

A That's correct.

Q With regard to those appendices, in Dr. Lichtman's report, he doesn't rely on any one election in those appendices to draw a conclusion; does he?

A I don't know what he relies on.

Q Well, you've read his report. Does he purport to rely on any particular election percentages?

A Not only does he not rely on any particular one, he never provides an overall assessment of how all the results for all the elections fit together in coming up with an estimate, and overall estimate.

Q So he basically uses those as sort of a background to show some, over 300 elections I believe, what his assessment of racial voting patterns is in Georgia over a wide number of elections. Is that correct?

A That's my understanding as to his intentions, yes.

Q And, have the pages that you have attached to Tabs Three and Four of your report, from Exhibits "168" and "169", you didn't pull those pages out, you pulled those pages out to illustrate the problems that you found; is that correct?

A That's correct.

Q So, these are going to be the ones that show what the problems might be, not necessarily representative of the typical page in your report of Dr. Lichtman's analysis.

A As part of my report, I also give overall summary statistics to the extent to which these problems existed in this set of elections.

Q But my question was with regard to these particular pages that you pulled out, those are designed to illustrate the problem; is that correct?

A Yes.

Q Now with regard to your analysis on pages one through, I believe it is 18 of your report, it basically boils down to a critique of the use of double ecological regression analysis to analyze racial voting patterns; isn't that correct?

A I'm not sure I understand the reference that you gave me. Page 18?

Q Page one through 18, I've been talking about this whole first section - - -

A Oh, one through 18.

Q of your report.

A Yes.

Q Are you familiar with the Supreme Court opinion of *Thornburg v. Gingles*?

A I read that opinion, it's been a while, yes.

Q And you're aware that in that case, the Court relies on, in fact, double ecological regression analysis estimates of voting behavior in drawing its conclusions about racially polarized voting.

A I don't recall whether they relied on double ecological regression estimates, but I think they did rely on some ecological regression estimate.

Q And those ecological regression estimates were performed by Dr. Bernard Grofman; is that right?

A I'm not sure.

Q You don't have any reason to dispute that, though?

A No.

Q Are you aware of any differences between the methodology that Dr. Lichtman employs and the methodology that was employed by the plaintiffs' expert in the *Thornburg v. Gingles* case?

A I'm not familiar with the methodology employed in the *Thornburg v. Gingles* case, so I can't, you know, tell you if there is any differences.

Q So if I - - -

A But I also don't know the extent to which that data had more precincts more amenable to double ecological regression.

Q But if I would represent to you that Dr. Lichtman employed the same analysis as Dr. Grofman did in the *Thornburg v. Gingles* case, you wouldn't have any reason to dispute me on that, would you?

MR. WALBERT: Objection as to the form of that question.

MR. PARKS: The plaintiffs join in that. I don't want to hear any objections, but it's - - -

MR. WALBERT: But he has just testified that he didn't know what happened, and for her to just argue the case and say, "you can't then tell me that - - -"

HONORABLE JUDGE BOWEN: "Well, that might be argumentative, and we'll save that.

Q (Ms. Murphy) Are you aware, Dr. Katz, that in the case of *Garza v. County of Los Angeles*, the type of critique that you're presenting here was presented extensively by a number of different statistical experts concerning analysis performed by both Dr. Lichtman and Dr. Bernard Grofman?

A Yes, but your, you have to keep in mind that the election data makes a big difference as to the appropriateness of methodology - - -

Q I am saying - - -

A The methodology, let me finish, please.

Q I'm sorry.

A A methodology by itself isn't usable for every conceivable data set. Just to say that somebody used ecological regression in one circumstance and it turned out to be a reasonable methodology, doesn't make it reasonable in every circumstance.

Q So you're saying that the Court in the *Garza* case rejected the kind of criticism that you're offering that that wouldn't necessarily lead to the same conclusion concerning your critique of Dr. Lichtman's analysis.

A Not necessarily. The data is totally different.

Q And are you aware that the *Garza* Court did reject those critiques?

A I'm not—I haven't read the *Garza* opinion, and I don't know what the Court did.

Q Now, after, on page, I believe, 20 of your report, you get into a somewhat different area, where you employ your own, if I can call it, *homogen[e]ous precinct analysis* to try and estimate racial voting patterns; is that correct?

A Average racial voting patterns.

Q Average racial voting patterns.

A Yes.

Q And if I understood your earlier testimony, you put three different sets of estimates for three different databases; is that correct?

A Is this on page 20 and 21?

Q Pages 20 through 21.

A Yes, I do.

Q And if I understood your earlier testimony, I take it that the third estimate that you report, which includes judicial elections, you would consider to not be very relevant or germane to this case. Is that correct?

A Well, in terms of relevance or germane to this case, I don't have an opinion on that. It's there to show that

when you throw in the additional judicial elections, that there is a substantial increase in the average percent vote of whites voting for the black candidate.

Q I apologize. I think my question was poorly phrased. In fact, you found a different pattern in the judicial, the state-wide judicial election that you analyzed in terms of voting patterns; is that correct?

A Different from what?

Q Different from the pattern you found in, say, the number two, all the data you analyzed in the number two estimate.

A Yes.

Q So which would you consider if you were trying to estimate voting behavior in a congressional election, congressional primary election. Which of these three sets of estimates that you report would you consider the most, the best estimate?

A Following Dr. Lichtman's political assumptions? Or do you want me to make my own assumptions, what I think would be the best thing to use.

Q Well, what assumptions would you make? I mean, your not a political scientist, are you?

A No.

Q Okay, so what assumptions would you make? Let's take a step backwards.

A Well, from a statistical perspective, I would want Congressional elections to estimate the degree of racial polarized voting in future Congressional elections, and other elections that are related to that.

Q So I'm asking you of these three sets of estimates

you report here, which would you consider the best and the most reliable. I realize they're not perfect, I understand your testimony.

A Okay. I would go with number two.

Q And based on the set of estimates in number two, would you say that there are substantially or significantly different voting patterns among black and white voters according to these estimates?

A Yes, in that the competence interval surrounding these numbers are about, plus or minus, 1%.

Q And do you have an opinion on whether or not these numbers would be indicative of racially polarized voting? Do you have an opinion?

I don't know if you're, if you feel comfortable giving an opinion since your [*sic*] a statistical person, not a political scientist or a political analyst.

A To the degree of whether it's legally significant, or - - -

Q No, just, if you understand the term *racially polarized voting* do you have an opinion on these numbers?

A Well, my opinion is that there is a 95% competence interval to the average percent white voting for black candidates that goes from 27% to 29%. So, to the degree that whites tend to vote for white candidates in the range of the approximately 71 to 73%, that's, there is a tendency for white voters to vote for white candidates.

Q Maybe I should ask the question a little differently. Rather than getting into a term that obviously has some legal implications, these numbers indicate a fair degree of cohesion among white voters and cohesion among black voters; is that correct? Can you agree with that?

A By *cohesion*, I think that's a legal term, too.

Q Oh, is it? Voting similarities? Can we agree on a term?

A Whites tend to vote for white candidates and blacks tend to vote for black candidates according to the results of number two.

Q Thank you. I have a question—I'm not sure if you still have these charts in front of you. This exhibit which you're still looking at here, Plaintiffs' "174", and you indicated that this is a chart indicating the probability of a black candidate getting elected where the percentage of black voters fell at certain intervals; is that correct?

A Yes.

Q And this particular chart we're looking at is the, includes the 1990 gubernatorial and 1992 labor commissioner, and the 1992 Second and Eleventh Congressional District races, as well as the many smaller elections included in Dr. Lichtman's data; is that right?

A Yes.

Q According to your estimates as based on this chart, at approximately—will you agree with me that the probability of a black candidate winning doesn't go above 50% until the percentage of black registered voters reaches approximately 50%?

A Yes. In the range from 45 to 50, that percentage is a 46% probability, and from 50 to 55%, that's a 62% probability. It's about 50%.

Q And, I'm now showing you Defendants' Exhibit "172", which is a similar chart that you did based only on what you termed "the Lichtman database," is that correct?

A That's correct.

Q And if I asked the same question, at what point does the probability of a black candidate winning go above 50%, what would your response be? Is it approximately 50%?

A. Let me check my numbers to be sure. Yes, it's approximately 50%. It's 44% in the range from 45 to 50% black registered voters, and the probability is 55% in the range from 50 to 55%.

C. [CORRECTED] REPORT OF DR. JOSEPH L. KATZ

[State's Exh. 170, at 14 (Part II)-22]

III. *ANALYSIS OF THE RELIABILITY OF THE ESTIMATION OF RACIAL VOTING PERCENTAGES DETERMINED BY DR. LICHTMAN.*

I have analyzed Dr. Lichtman's primary election database that was provided on computer diskettes by the Department of Justice and Dr. Lichtman. The data included on these diskettes encompass the great majority of those elections for which racially polarized voting estimates are given in Appendix 1 and Appendix 2 of Dr. Lichtman's report. I find that the potential difficulties with double ecological regression racial voting estimates, enumerated in the previous section, are present, to varying degrees, in the analysis of these elections.

Approximately 50% of the elections in the Lichtman database have nine or fewer precincts. Approximately 38% of the elections have one or more impossible values for the four turnout estimates. Approximately 32% of the elections have registration data taken from a year that is different from the year of the election.

The racial polarization voting estimates in Dr. Lichtman's report are single numbers or "point estimates" derived as ratios from four estimates of white and black voter turnout for white and black candidates in an election, taken from two separate "least squares" lines. In the context of statistical regression methodology, each of the four voter turnout estimates is subject to some degree of variation from the "true" voter

turnout percentages that are sought.[4] I have constructed 95% confidence intervals for each of the four voter turnout estimates to assess this variation.[5] These confidence intervals, in turn, assist in evaluating the reliability of the racial vote estimates derived from double ecological regression. My detailed analyses of these elections, individually, are contained in State Exhibit 166.

(Illustrative excerpts from this exhibit that pertain to several of the Lichtman elections follow Tab 3)

A brief summary of the results of my confidence interval determinations are the following:

(1) In fully half of the elections in the Lichtman database, the length of the 95% confident interval for the white turnout for white candidates was 26% or greater.

(2) In half of the elections, the length of the confidence intervals for white turnout for black candidates was 18% or greater.

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[4]Hypothetically, this particular analysis would not apply in a case where every precinct in an election was 100% homogeneous, white or black, because in that instance double ecological regression produces exact racial vote percentages. In the Lichtman data, which is comprised entirely of precincts that are at least to some extent mixed, there is necessarily some degree of statistical variability in voter turnout estimates.

[5]I have used 95 percent confidence intervals, which means that, based on the election data analyzed, there is a .95 probability that the "true" voter turnout percentage for an election is contained somewhere in the interval. The 95% level is typically used in statistical analysis.

The statistical regression methodology for constructing confidence intervals is not a perfect answer to the variability issue with ecological regression estimates, but it is the most appropriate measure available.

(3) In half of the elections, the length of the confidence interval for black turnout for black candidates was 23% or greater.

(4) In half of the elections, the length of the confidence interval for black turnout for white candidates was 34% or greater.

The sensitivity of the racial vote percentages to the lengths of these 95% confidence intervals is demonstrated by the following example. Suppose that, in a certain election, double ecological regression predicts a 15% turnout of whites for the white candidate(s) and a 5% turnout of whites for the black candidate(s). Therefore, the estimated percentage of white voters voting for the white candidate(s) is 15/(15 + 5) or 75%, and the estimated percentage of white voters voting for the black candidate(s) is 25%.

Using the above-stated median percentage for our example indicates that there is a 95% chance that the "true" percentage of white registered voters who turned out for the white candidate is between 2% and 28%. Similarly, there is a 95% chance that the "true" white turnout for the black candidate(s) is between -4% and 14%, even though a negative result is a practical impossibility.

Different selections of voter turnout from the two 95% confidence intervals can generate significantly different white vote percentages. For example, if 6% of the white registered voters turn out for the white candidate(s) and 14% for the black candidate(s), then 20% of the white voters still turn out to vote, as in our initial estimate. However, only 30% of the white voters are then predicted to have voted for the white candidate(s), compared to the original 75%.

I also produced 95% confidence intervals, under the

statistical regression methodology, for racial vote estimates based upon single ecological regression for a subset of elections from the Lichtman database.[6] For the most part, these confidence intervals are fairly wide. My detailed analyses of these elections, individually, are contained in State Exhibit 165. (Some illustrative excerpts from this exhibit that pertain to several of the Lichtman elections follow Tab 4)

As part of his results, Dr. Lichtman reports squared correlation coefficients, or R^2 values. Although Dr. Lichtman estimates racial voting behavior based on double ecological regressions, the R^2 reported by Dr. Lichtman pertains to values he has calculated for *single* ecological regression. More significantly, R^2 values do not measure the accuracy or degree of confidence of racial voting estimates derived from single or double ecological regression.[7] Thus, a high R^2 value says nothing about the statistical confidence level applicable to those voting estimates.

I conclude that Dr. Lichtman's small election by small election analyses do not provide a meaningful and reliable description of racial voting behavior in Georgia.

IV. *ANALYSIS OF RACIAL VOTING PERCENTAGES OVER MANY GEORGIA ELECTIONS.*

While Dr. Lichtman's analyses do not lend themselves to a meaningful description of racial voting behavior in

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[6]This subset was the portion of his data provided by the Department of Justice in an earlier diskette.

[7]For exmple, if all the precincts in the election were 100% racially homogenous, single and double ecological regression would produce exact racial voting percentages regardless of the slope of the least squares line. But the R^2 value could be anywhere from 0 to 1.0

Georgia generally, that is not to say that this data is utterly irrelevant to that issue. A better methodology using this data would be to measure overall racial voting behavior by estimating the *average* racial voting percentages over a representative set of Georgia elections. My method differs from that of Dr. Lichtman and Dr. Weber in that I do not estimate racial voting patterns in individual elections, but seek to examine average voting patterns over a number of elections.[8]

Moreover, because of the methodological problems inherent in double ecological regression analysis, and particularly because of the incorrect assumption that voter turnout is a linear function, a methodologically sound way to determine estimates of racial voting patterns is to look at the homogeneous precincts—i.e., those 100 percent one race or the other, or nearly so.[9] To determine overall voting behavior, the results for all of the homogenous precincts for the various elections

[8]While these methodologies can eliminate some of the statistical problems of Dr. Lichtman's analysis, they still do require certain assumptions about voting behavior. For example, a homogeneous precinct analysis reguires the assumption that white voters in a homogenous white precinct vote the same as white voters in a non-homogenous precinct, and the same thing for black voters. That may or may not be true, and it is statistically impossible to determine whether or not it is true.

[9]In this analysis, I have used only those precincts that are 95%-100% one race or the other. Dr. Lichtman does do a similar kind of homogenous precinct analysis, but his determinations consider as "homogeneous" any precinct that is between 80% and 100% one race or the other. Calling precincts "homogeneous" when they have such a large degree of heterogeneity substantially affects the reliability and accuracy of the estimates derived.

are averaged together, weighted by the number of voters in the precincts.[10]

I have also made these determinations of racial voting patterns using homogenous precinct analysis for several different data sets. First is the Lichtman data set, again utilizing all of those elections of his that were provided to me by Dr. Lichtman and the Department of Justice. I have also made the same determinations for an election data set consisting of those in Dr. Lichtman's data set plus other major recent elections involving black-white candidates in Georgia—the Governor's primary election in 1990 (which involved Andrew Young; only a portion of the precincts from this election were included in Dr. Lichtman's data); the 1992 Labor Commissioner primary (which included black candidate Al Scott); and the second and eleventh congressional primary races from 1992.

Finally, I have made the same calculations for the most comprehensive available database of Georgia elections with black-white opponents. This includes the Lichtman data, all of the four large races mentioned above, and all four state-wide black-white judicial races (again, portions of one of these races were already included in Dr. Lichtman's data).

The results are as follows:

LICHTMAN ELECTION DATA (No. 1)

Average Percent Whites Voting for Black Candidates	*Average Percent Blacks Voting For White Candidates*
22%	23%

[10]"Weighting" gives a proportionally greater weight to a precinct with more voters than one with less. This avoids another problem inherent in the presentation by Dr. Lichtman which makes no distinction between an election that may have occurred in a small county or district with a few voters and one that may have occurred from an election in a county or a district with far more voters.

LICHTMAN ELECTIONS PLUS REST OF GOVERNOR, LABOR AND CONGRESS (No. 2)

Average Percent Whites Voting for Black Candidates	*Averace Percent Blacks Voting For White Candidates*
28%	20%

LICHTMAN ELECTIONS PLUS REST OF GOVERNOR LABOR, CONGRESS AND JUDICIAL (No. 3)

Average Percent Whites Voting for Black Candidates	*Average Percent Blacks Voting For White Candidates*
38%	20%

V. *AN ANALYSIS OF THE LIKELIHOOD OF BLACK CANDIDATES PREVAILING OVER WHITE OPPONENTS IN DISTRICTS OF VARYING PERCENTAGES OF BLACK VOTERS.*

I have been asked to perform a statistical analysis, if possible, that predicts the likelihood of black candidates prevailing over white opponents, based on the existing data, as a function of the racial percentage of the election district. Neither Dr. Lichtman nor Dr. Weber have done such an analysis.

First, I determined the frequency distribution for black candidates winning individual precincts in the available data sets as a function of the racial composition of those precincts. From that frequency distribution, I then calculated the probabilities of black candidates winning in entire election districts as a function of the percentage of black registered voters in the district. These results were graphically plotted for several data sets. In making these plots, I have used intervals of five

percent (for example, a range of 40 percent to 45 percent, and then 45 percent to 50 percent, of black registered voters). The results of these probability analyses are contained after Tab 5.

Generally speaking, the results of this analysis indicate that black candidates in the several election databases have relatively low chances of winning against white opponents when the percentage of black registered voters is relatively small. However, the chances of black success are by no means zero even when the percentage of black registered voters in a district may be as low as 25 or 30 percent. Then, the likelihood of a black candidate winning the election and defeating his white opponents increases steadily until the percent of black registered voters becomes a significant majority (approximately 55-60 percent, although the number varies depending on the specific election database). The likelihood of an African-American candidate winning plateaus in the 70-80 percent range, and then increases slowly as the percentage of black registered voters increases on up to 100 percent.

DR. LICHTMAN'S PRIMARY ELECTION DATABASE
(RECEIVED 06/94)
BALDWIN COUNTY
COUNTY COMMISSIONER (1) 1988
INITIAL ELECTION
VOTER REGISTRATION, 1988
WHITE VOTER REGISTRATION, 5506
BLACK VOTER REGISTRATION, 2241
5 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 41%
ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): 16%

SQUARED CORRELATION (R-SQ)
WHITE: 0.0122
SQUARED CORRELATION (R-SQ)
BLACK: 0.0212

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE
WHITE: 0.8595
P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE
BLACK: 0.8153

ESTIMATED TURNOUT

	WHITE VOTERS	BLACK VOTERS	TOTAL
FOR WHITE CAND(S)	3.5% (193)	6.6% (149)	341
FOR BLACK CAND(S)	5.0% (276)	1.3% (29)	305
ESTIMATED TOTAL TURNOUT	8.5% (469)	7.9% (178)	646

TURNOUT CONFIDENCE INTERVALS

	WHITE VOTERS	BLACK VOTERS
FOR WHITE CAND(S)	-26% TO 33%	-34% TO 47%
FOR BLACK CAND(S)	-21% TO 31%	-35% TO 38%

DR. LICHTMAN'S PRIMARY ELECTION DATABASE
(RECEIVED 06/94)
BRANTLEY COUNTY
COUNTY COMMISSIONER (3) 1980
RUNOFF ELECTION
VOTER REGISTRATION, 1980
WHITE VOTER REGISTRATION, 4549
BLACK VOTER REGISTRATION, 294
9 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 56%
ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): 453%

SQUARED CORRELATION (R-SQ)
WHITE: 0.2912
SQUARED CORRELATION (R-SQ)
BLACK: 0.1024

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE
WHITE: 0.1337
P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE
BLACK: 0.4013

ESTIMATED TURNOUT

	WHITE VOTERS	BLACK VOTERS	TOTAL
FOR WHITE CAND(S)	41.7% (1896)	-69.1% (-203)	1693
FOR BLACK CAND(S)	32.5% (1479)	88.7% (261)	1740
ESTIMATED TOTAL TURNOUT	74.2% (3375)	19.6% (58)	3433

TURNOUT CONFIDENCE INTERVALS

	WHITE VOTERS	BLACK VOTERS
FOR WHITE CAND(S)	12% TO 71%	-228% TO 89%
FOR BLACK CAND(S)	4% TO 61%	-64% TO 241%

DR. LICHTMAN'S PRIMARY ELECTION DATABASE
(RECEIVED 06/94)
BROOKS COUNTY
SCHOOL BOARD 1986
RUNOFF ELECTION
VOTER REGISTRATION, 1986
WHITE VOTER REGISTRATION, 4120
BLACK VOTER REGISTRATION, 2272
11 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 152%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): 66%

SQUARED CORRELATION (R-SQ)
WHITE: 0.104

SQUARED CORRELATION (R-SQ)
BLACK: 0.8814

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE
WHITE: 0.3334

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE
BLACK: 0

ESTIMATED TURNOUT

	WHITE VOTERS	BLACK VOTERS	TOTAL
FOR WHITE CAND(S)	9.6% (397)	23.2% (526)	923
FOR BLACK CAND(S)	-3.3% (-136)	44.4% (1010)	874
ESTIMATED TOTAL TURNOUT	6.3% (261)	67.6% (1536)	1797

TURNOUT CONFIDENCE INTERVALS

	WHITE VOTERS	BLACK VOTERS
FOR WHITE CAND(S)	-8% TO 27%	-1% TO 47%
FOR BLACK CAND(S)	-11% TO 5%	34% TO 55%

DR. LICHTMAN'S PRIMARY ELECTION DATABASE
(RECEIVED 06/94)
COLUMBIA COUNTY
COUNTY COMMISSIONER (5) 1984
RUNOFF ELECTION
VOTER REGISTRATION, 1983
WHITE VOTER REGISTRATION, 12805
BLACK VOTER REGISTRATION, 1843
12 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 59%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): 70%

SQUARED CORRELATION (R-SQ)
WHITE: 0.2051

SQUARED CORRELATION (R-SQ)
BLACK: 0.6216

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE WHITE: 0.1393

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE BLACK 0.0023

ESTIMATED TURNOUT

	WHITE VOTERS	BLACK VOTERS	TOTAL
FOR WHITE CAND(S)	15.6% (2001)	26.5% (489)	2491
FOR BLACK CAND(S)	11.0% (1403)	62.3% (1149)	2552
ESTIMATED TOTAL TURNOUT	26.6% (3405)	88.9% (1638)	5043

TURNOUT CONFIDENCE INTERVALS

	WHITE VOTERS	BLACK VOTERS
FOR WHITE CAND(S)	7% TO 24%	13% TO 40%
FOR BLACK CAND(S)	-4% TO 26%	38% TO 87%

DR. LICHTMAN'S PRIMARY ELECTION DATABASE
(RECEIVED 06/94)
COWETA JUDICIAL CIRCUIT
PRESIDENT 1988
PRESIDENTIAL PREFERENCE ELECTION
VOTER REGISTRATION, 1986
WHITE VOTER REGISTRATION, 5948
BLACK VOTER REGISTRATION, 3149
12 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 103%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): 101%

SQUARED CORRELATION (R-SQ) WHITE: 0.4238

SQUARED CORRELATION (R-SQ) BLACK: 0.9119

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE WHITE: 0.0219

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE BLACK: 0

ESTIMATED TURNOUT

	WHITE VOTERS	BLACK VOTERS	TOTAL
FOR WHITE CAND(S)	23.3% (1386)	-0.3% (-8)	1378
FOR BLACK CAND(S)	-0.7% (-39)	42.9% (1351)	1312
ESTIMATED TOTAL TURNOUT	22.6% (1347)	42.6% (1343)	2690

TURNOUT CONFIDENCE INTERVALS

	WHITE VOTERS	BLACK VOTERS
FOR WHITE CAND(S)	11% TO 36%	-16% TO 15%
FOR BLACK CAND(S)	-7% TO 5%	35% TO 50%

DR. LICHTMAN'S PRIMARY ELECTION DATABASE
(RECEIVED 06/94)
FRANKLIN COUNTY
BOARD OF EDUCATION 1984
RUNOFF ELECTION
VOTER REGISTRATION, 1984
WHITE VOTER REGISTRATION, 7793
BLACK VOTER REGISTRATION, 429
13 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 49%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): 117%

SQUARED CORRELATION (R-SQ) WHITE: 0.0315

SQUARED CORRELATION (R-SQ) BLACK: 0.2361

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE WHITE: 0.5617

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE BLACK: 0.0923

ESTIMATED TURNOUT

	WHITE VOTERS	BLACK VOTERS	TOTAL
FOR WHITE CAND(S)	24.9% (1941)	1.7% (7)	1948
FOR BLACK CAND(S)	26.5% (2061)	-11.8% (-50)	2011
ESTIMATED TOTAL TURNOUT	51.4% (4002)	-10.1% (-43)	3959

TURNOUT CONFIDENCE INTERVALS

	WHITE VOTERS	BLACK VOTERS
FOR WHITE CAND(S)	10% TO 40%	-97% TO 101%
FOR BLACK CAND(S)	19% TO 34%	-65% TO 41%

DR. LICHTMAN'S PRIMARY ELECTION DATABASE
(RECEIVED 06/94)
IRWIN COUNTY
COUNTY COMMISSIONER (1) 1980
INITIAL ELECTION
VOTER REGISTRATION, 1981
WHITE VOTER REGISTRATION, 2909
BLACK VOTER REGISTRATION, 560
10 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 57%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): -2677%

SQUARED CORRELATION (R-SQ) WHITE: 0.0604

SQUARED CORRELATION (R-SQ) BLACK: 0.2961

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE WHITE: 0.4937

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE BLACK: 0.1039

ESTIMATED TURNOUT

	WHITE VOTERS	BLACK VOTERS	TOTAL
FOR WHITE CAND(S)	42.2% (1228)	16.7% (93)	1321
FOR BLACK CAND(S)	32.3% (939)	-16.1% (-90)	849
ESTIMATED TOTAL TURNOUT	74.5% (2167)	0.6% (3)	2170

TURNOUT CONFIDENCE INTERVALS

	WHITE VOTERS	BLACK VOTERS
FOR WHITE CAND(S)	15% TO 70%	-64% TO 97%
FOR BLACK CAND(S)	12% TO 53%	-75% TO 43%

DR. LICHTMAN'S PRIMARY ELECTION DATABASE
(RECEIVED 06/94)
IRWIN COUNTY
COUNTY COMMISSIONER (1) 1980
RUNOFF ELECTION
VOTER REGISTRATION, 1981
WHITE VOTER REGISTRATION, 874
BLACK VOTER REGISTRATION, 115
6 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 52%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): -32%

SQUARED CORRELATION (R-SQ)
WHITE: 0.014

SQUARED CORRELATION (R-SQ)
BLACK: 0.1394

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE
WHITE: 0.8233

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE
BLACK: 0.466

ESTIMATED TURNOUT

	WHITE VOTERS	BLACK VOTERS	TOTAL
FOR WHITE CAND(S)	37.7% (329)	57.3% (66)	395
FOR BLACK CAND(S)	34.3% (300)	-13.9% (-16)	284
ESTIMATED TOTAL TURNOUT	72.0% (629)	43.5% (50)	679

TURNOUT CONFIDENCE INTERVALS

	WHITE VOTERS	BLACK VOTERS
FOR WHITE CAND(S)	-29% TO 104%	-171% TO 285%
FOR BLACK CAND(S)	-14% TO 83%	-179% TO 151%

DR. LICHTMAN'S PRIMARY ELECTION DATABASE
(RECEIVED 06/94)
JENKINS COUNTY
COUNTY COMMISSIONER (1) 1972
RUNOFF ELECTION
VOTER REGISTRATION, 1972
WHITE VOTER REGISTRATION, 2940
BLACK VOTER REGISTRATION, 1152
7 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 54%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): 49%

SQUARED CORRELATION (R-SQ)
WHITE: 0.0621

SQUARED CORRELATION (R-SQ)
BLACK: 0.1589

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE
WHITE: 0.5899

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE
BLACK: 0.3758

ESTIMATED TURNOUT

	WHITE VOTERS	BLACK VOTERS	TOTAL
FOR WHITE CAND(S)	24.3% (715)	60.6% (698)	1413
FOR BLACK CAND(S)	20.3% (598)	58.9% (678)	1276
ESTIMATED TOTAL TURNOUT	44.6% (1312)	119.5% (1377)	2689

TURNOUT CONFIDENCE INTERVALS

	WHITE VOTERS	BLACK VOTERS
FOR WHITE CAND(S)	-8% TO 57%	-16% TO 137%
FOR BLACK CAND(S)	-0% TO 41%	11% TO 107%

LICHTMAN DATA (REVISED)
BALDWIN COUNTY
COUNTY COMMISSIONER (1) 1988
INITIAL ELECTION
VOTER REGISTRATION, 1988
5 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 17.7 %

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): -40%

CONFIDENCE INTERVAL WHITE VOTE FOR WHITE CANDIDATE(S): -3.9% TO 39.3 %

CONFIDENCE INTERVAL BLACK VOTE FOR BLACK CANDIDATE(S): -69.9% TO -10.1%

SQUARED CORRELATION (R-SQ): 0.92

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE: 0.01

LICHTMAN DATA (REVISED)
BRANTLEY COUNTY
COUNTY COMMISSIONER (3) 1980
RUNOFF ELECTION
VOTER REGISTRATION, 1980
9 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 56.4%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): 164.9%

CONFIDENCE INTERVAL WHITE VOTE FOR WHITE CANDIDATE(S): 16.9% TO 95.9%

CONFIDENCE INTERVAL BLACK VOTE FOR BLACK CANDIDATE(S): -47.5% TO 377.3%

SQUARED CORRELATION (R-SQ): 0.21

P-VAI UE MEASURE OF STATISTICAL SIGNIFICANCE:
0.214

LICHTMAN DATA (REVISED)
BROOKS COUNTY
SCHOOL BOARD 1986
RUNOFF ELECTION
VOTER REGISTRATION, 1986
11 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 87.1%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): 100%

CONFIDENCE INTERVAL WHITE VOTE FOR WHITE CANDIDATE(S):
54.3% TO 119.9%

CONFIDENCE INTERVAL BLACK VOTE FOR BLACK CANDIDATE(S):
55.7% TO 144.3%

SQUARED CORRELATION (R-SQ): 0.51

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE:
0.014

LICHTMAN DATA (REVISED)
COLUMBIA COUNTY
COUNTY COMMISSIONER (5) 1984
RUNOFF ELECTION
VOTER REGISTRATION, 1983
12 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 55.7%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): 82.3%

CONFIDENCE INTERVAL WHITE VOTE FOR WHITE CANDIDATE(S):
33.6% TO 77.8%

CONFIDENCE INTERVAL BLACK VOTE FOR BLACK CANDIDATE(S):
46.9% TO 117.7%

SQUARED CORRELATION (R-SQ): 0.4

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE:
0.028

LICHTMAN DATA (REVISED)
IRWIN COUNTY
COUNTY COMMISSIONER (1) 1980
INITIAL ELECTION
VOTER REGISTRATION, 1981
10 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 56.5%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): 14.5%

CONFIDENCE INTERVAL WHITE VOTE FOR WHITE CANDIDATE(S):
22.8% TO 90.2%

CONFIDENCE INTERVAL BLACK VOTE FOR BLACK CANDIDATE(S):
-84.4% TO 113.4%

SQUARED CORRELATION (R-SQ): 0.06

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE:
0.514

LICHTMAN DATA (REVISED)
IRWIN COUNTY
COUNTY COMMISSIONER (1) 1980
RUNOFF ELECTION
VOTER REGISTRATION, 1981
6 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 52.1%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): -6.1%

CONFIDENCE INTERVAL WHITE VOTE FOR WHITE CANDIDATE(S): -24.8% TO 129%

CONFIDENCE INTERVAL BLACK VOTE FOR BLACK CANDIDATE(S): -268.4% TO 256.2%

SQUARED CORRELATION (R-SQ): 0.07

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE: 0.604

LICHTMAN DATA (REVISED)
JENKINS COUNTY
COUNTY COMMISSIONER (1) 1972
RUNOFF ELECTION
VOTER REGISTRATION, 1972
7 DATA POINTS

ESTIMATED PERCENT OF WHITE VOTES CAST FOR WHITE CANDIDATE(S): 53.9%

ESTIMATED PERCENT OF BLACK VOTES CAST FOR BLACK CANDIDATE(S): 50.9%

CONFIDENCE INTERVAL WHITE VOTE FOR WHITE CANDIDATE(S): 18.2% TO 89.6%

CONFIDENCE INTERVAL BLACK VOTE FOR BLACK CANDIDATE(S): -32.1% TO 133.9%

SQUARED CORRELATION (R-SQ): 0

P-VALUE MEASURE OF STATISTICAL SIGNIFICANCE: 0.948

D. TESTIMONY OF ALLAN J. LICHTMAN

[Excerpts from Trial Testimony 4 T. Tr. p. 199, line 15 to p. 207, line 22; p. 227, line 17 to p. 228, line 24]

MS. MURPHY: For the Court's reference, Dr. Lichtman has prepared a report which is labeled as DOJ Exhibit "24" as well as a supplemental report which is labeled DOJ Exhibit "41". I would ask that both of those be admitted into evidence.

Dr. Lichtman will be discussing them here.

HONORABLE JUDGE BOWEN: "24" and "41" are admitted.

Q (Ms. Murphy) How did you conduct your analysis of racially polarized voting, Dr. Lichtman?

A I used a two-method standard in the field and about which I've written. One is a ecological regression analysis which examines all the precincts within a district. And, the other one is extreme case analysis which focuses on the most heavily white and the most heavily black precincts in a district, either it be 80% or for Districts Eleven and Two at the 90% level.

These are the same methodologies utilized by Dr. Bernard Grofman, the expert for Plaintiffs in *Thornburg versus Gingles*, and they are the same methods that both Dr. Grofman and I used as co-experts in the Los Angeles County redistricting matter, *Garza versus Los Angeles County*, and they are discussed in my books and articles.

Q Were you able to draw any conclusions concerning racially polarized voting?

A Yes.

Q And, what were those?

A First of all, I examined more than 300 elections statewide in districts throughout the state covering a great variety of different public offices and spanning about a 20-year period.

What I found was a very common pattern among those more than 300 elections such that there was the presence of racially polarized voting. Specifically, I found that black voters were usually cohesive behind black candidates running in these elections and I should say these are all black versus white contests that empirically black voters overwhelmingly tended to favor black candidates in more than 300 black versus white contests.

And, conversely, white voters usually in overwhelming numbers tended to favor the white candidates competing in those elections. And, I found that there was no particular pattern over time either suggesting an increase or a diminution of racially polarized voting. Rather, you have the presence of racially polarized voting throughout the period.

This is confirmed both by ecological regression analysis and the analysis that spotlights the heavily black and heavily white precincts. It is also sustained by the standard checks that Dr. Grofman and I employ and that's discussed in the literature for reliability of these results.

Q Were there any exceptions to the pattern of racially polarized voting that you found?

A There are always some exceptions. In social science we do not look for uniform patterns, we look for unusual patterns. And, perhaps the most notable exception would be judicial elections with black incumbents. But, the exceptions are few.

Q Are the results of this analysis you've been discussing reported in the appendices to your report?

A Yes, Appendix 1 and 2, I report the ecological regression and the extreme case analysis, respectively.

Q And, are most of the elections reported in the appendices, were they 1990 or prior? Were most of those elections for 1990 going back to 1970?

A Yes, the great bulk of the analyses I did was done when only elections through 1990 was available. It should also be noted that these elections focus on Democratic primary and runoff elections.

And, I believe those to be the significant elections in the matter before us as well because it is the Democratic primaries and runoffs that essentially determine who is going to be elected from the Eleventh and Second Congressional Districts.

Q In your analysis of racially polarized voting, did you also do some analyses that focus specifically on the Eleventh and the Second Congressional District?

A Yes, I did.

Q And, what was that analysis?

A What I was able to do for those districts specifically was examine elections conducted on a statewide basis, but isolated within the boundaries of Districts Eleven and Two. I was able to analyze some eight such elections for District Eleven, including of course, the 1992 primary and runoff election in those districts.

These are all black versus white primary or runoff elections in District Eleven and I was able to examine some seven such statewide black versus white elections specifically within the boundaries of District Two as well.

Q And, did you draw any conclusions from that analysis?

A Yes. What I found that when you spotlighted elections within the Eleventh and Second Congressional District, was that voting was indeed polarized along racial lines with a very substantial majority of black voters usually voting for the black candidate or candidates in these elections and likewise a very substantial majority of white voters usually voting for the white candidate or candidates in these elections and that was true of both the Eleventh and Second Congressional Districts.

Q Were there any exceptions to that pattern that you just discussed?

A Yes, there were.

Q What were they?

A When you look at the Democratic Primary and Democratic Runoff elections within the confines of District Eleven, you find essentially that there are two exceptions, both elections involving multiple black candidates and both of them primary elections only.

In the District Eleven primary for Congress, the percent of white voters voting for black candidates was a majority, 55%, and in the 1992 Democratic Primary for Labor Commissioner, the percent of white voters voting for black candidates was 45%.

Within District Two there is one exception and that exception is the 1992 Democratic Primary for Labor Commissioner in which 52% of white voters voted for black—the two black candidates in the initial primary.

Q For each of those three elections you just noted, did you also examine the Democratic Primary runoffs?

A Yes, each of those elections went to a runoff and you found when you went to the runoff elections polarization substantially increased and returned to the more usual patterns of substantial majorities of black voters voting for the single black candidate and substantial majorities of white voters voting for the single white candidate.

In all cases, either blacks for blacks or whites for whites, it was in excess of 70%.

Q Are the results of that analysis you've just been discussing in Districts Eleven and Two reported in Tables 1 through 4 of your report?

A Yes.

Q Do you have a definition, Dr. Lichtman, of politically significant racially polarized voting?

A Yes.

Q And, what would that be?

A Racially polarized voting exists in a kind of a raw sense when blacks and whites differ in their choice of candidates. It becomes politically significant when differences in the choice of candidates has an impact upon the ability of black voters, or generally minority voters, to elect candidates of their choice.

Q And, did you apply that definition here in this analysis that you did?

A Yes.

Q And, what was your conclusion?

A As follows. Given the substantial differences in the usual patterns of black and white voting, there is certainly the potential for voting to become politically significant. That is, there is certainly the potential for

white-black voting, given black cohesion to have an impact on the ability of black voters to elect candidates of their choice.

However, in—particularly in the Eleventh District, but in the Eleventh and the Second District, there turns out to be a sufficient concentration of minority voters that both majority black districts such that even given the polarization the black voters are able to elect candidates of their choice. So, specific to these districts politically significant racially polarized voting does not emerge.

Q Do you have an opinion as to whether if the black percentages, the black percentage of population in these districts was reduced, whether voting might become politically significantly racially polarized?

MR. PARKS: Your Honor, if I might. I think that there's a pretty significant difference in the percentage of those districts and I think we need to ask that question by district.

HONORABLE JUDGE BOWEN: Do you mind separating it?

A I certainly don't.

HONORABLE JUDGE BOWEN: All right.

A First of all, for the Eleventh District, you're dealing with a district that's around 60% in its voting age population. Under conditions of racially polarized voting, to the extent you reduce the percentages of minorities in the district, you are going to reduce the opportunities for minority voters to elect candidates of choice.

So, as you move down from approximately 60% towards the 50% level and above, you are obviously going to increase the potential for politically significant racially polarized voting. And, if this were to become a

majority white or perhaps even a near-majority white district, it is my view you would have politically significant racially polarized voting.

Obviously, in the Second District, because you're dealing with a much lower initial percentage, you have a smaller margin. And, in this case, smaller reductions wouldn't take much to transform that district into a majority white district and you would again have the potential for politically significant racially polarized voting to operate.

Q (Ms. Murphy) Moving on to the second issue in your report, Dr. Lichtman, did you do some examination of socioeconomic differences and political consequences?

A Yes, the second thing I looked at was the extent of differences in the socioeconomic standing of whites and blacks within the State of Georgia and then at a question of whether such socioeconomic differences, if they emerge, have political consequences for the ability of blacks to participate fully in the political process and elect candidates of their choice.

Q How did you analyze that question?

A First, with respect to socioeconomic differences it's quite simple. I looked at the 1990 U.S. Census of Housing and Population. I looked at standard measures of income occupation and education and, indeed, would find on such standard measures that there are substantial differences between blacks and whites such that blacks and whites—such that whites do have a substantially higher socioeconomic status.

Secondly, I looked at the political consequences of such differences in socioeconomic status. And, the political consequences are that differences in socioeconomic status affect the political resources, particularly under

conditions of racially polarized voting available to groups, such things as campaign finance, facilities, well-educated candidates, transportation and communication.

It's also well known that socioeconomic differences can have an impact on turnout, the participation of the advantaged versus the disadvantaged group. It's always a barrier, but sometimes the disadvantaged group is able to overcome that barrier. That was not the case, however, in the State of Georgia.

* * *

Q (Ms. Murphy) What other analysis is included or reported in your supplemental report, Dr. Lichtman?

A Let's see. The second thing I did was—and these, I believe are the only elections I looked at that were not my primary focus elections, Democratic Primaries and particular runoffs. I looked at some non-partisan judicial elections conducted statewide in 1990 and 1992 that you could look at in Districts Eleven and Two.

Q And, why did you analyze those judicial elections, Dr. Lichtman?

A Well, there have been some judicial elections in my early appendix because I included some results from a previous report I had done and but more specifically Dr. Weber had analyzed these elections and given some opinions about it and I thought it prudent, given that I had time between the two reports, to do the analysis myself.

Q And, what conclusions were you able to draw from analyzing these elections?

A Well, I think it's quite clear that the patterns in these judicial elections are different than the overwhelming patterns in the other elections. And, in my

view, as I said, these are the only elections that weren't Democratic Primaries or runoffs, they're a very limited utility. They are non-partisan.

And, in addition, each of them includes an appointed black incumbent and I've now had experience analyzing judicial elections throughout the south in numerous states and my experience is that judicial elections with black incumbents are quite different from other elections. They're quite different from non-judicial elections and they're even different from open-seat black versus white judicial elections. So, while I've included them in here for completeness, I believe they're of minimal relevance and certainly do not affect any prior conclusions.

E. REPORT [BY DR. ALLAN J. LICHTMAN] ON ISSUES RELATING TO GEORGIA CONGRESSIONAL DISTRICTS

[Defendants' Exh. 24, at p. 3 line 7-p. 20, line 1; pp. 30-31, & Charts from Appendix 1]

METHODOLOGY AND DATA

The main data base for this study consists of precinct-by-precinct election returns for numerous black versus white elections held statewide and within various jurisdictions in the state of Georgia. The data base also includes official, state of Georgia precinct-by-precinct registration data, with black and white registrants separately identified. The U.S. Department of Justice and the state of Georgia provided the election returns, registration data, and racial identification of candidates.

The analysis of racially polarized voting focuses on Democratic primary and runoff elections. Districts 11 and 2 are sufficiently Democratic that a primary victory is virtually tantamount to election. Their Democratic predominance is documented by overwhelming Democratic victories in statewide general elections within the precincts of Districts 11 and 2 as well as by the strongly Democratic results of the 1992 general elections for Congress in Districts 11 and 2.[1]

Standard statistical methods were employed to explore patterns of racially polarized voting by blacks and whites as well as patterns of voter turnout by blacks and whites. An examination of racially polarized

[1]As part of the data it prepared for the redistricting process the state "recompiled" general election returns for the precincts of proposed Districts 11 and 2. This information is contained in Reapportionment Services Office, Georgia General Assembly, "'Conference Report," March 31, 1992.

voting considers both the cohesion of the black electorate and bloc voting by the white electorate.

The analysis of black voter cohesion and bloc voting by whites follows procedures recognized by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and applied by the Court to single-member districts plans in *Quilter v. Voinovich* 113 S.Ct 1149 (1993). Appropriate procedures for analyzing these issues are also discussed in the social science literature. [2]

The voting behavior of whites and blacks in Georgia is estimated by comparing the racial composition of the various voting precincts to the division of the vote among competing candidates in each precinct. Ecological regression, the standard method for inferring the behavior of population groups from data collected for aggregate units, was used to estimate the voting behavior of blacks and whites.

The ecological regression procedure for analyzing the behavior of voter groups is set forth in my book, *Ecological Inference* (Sage Series on Quantitative

[2]See, for example, Chandler Davidson, ed., *Minority Vote Dilution* (Washington, DC: Howard University Press, 1984); Richard Engstrom, "Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting," *Urban Lawyer* (1985); James Loewen and Bernard Grofman, "Comment: Recent Developments in Methods Used in Voting Rights Litigation," *Urban Lawyer* (1989); Allan J. Lichtman, "Passing the Test: Ecological Regression in the Los Angeles County Case and Beyond," *Evaluation Review* (1991); Bernard Grofman and Chandler Davidson, eds., *Controversies in Minority Voting: The Voting Rights Act in Perspective* (1992); Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (Cambridge: Cambridge University Press, 1992); Allan J. Lichtman and J. Gerald Hebert, "A General Theory of Vote Dilution," *La Raza Law Journal* (1993).

Applications in Social Science, 1978: with Laura Irwin Langbein) and analyzed, in depth, in my December, 1991 article in *Evaluation Review.*

Black and white voting can also be examined through a technique termed extreme case analysis that examines the actual choices of voters in the most heavily black and the most heavily white precincts in a jurisdiction. The extreme case results will not correspond exactly with the results of ecological regression analysis. The 80%+ and 90%+ black and white precincts used in this study obviously include no mid-range precincts and include some voters of the other race.[3] Unlike ecological regression, extreme case analysis involves no inferential procedures. It simply tallies the votes actually cast for black and white candidates in the heavily black and heavily white precincts.

The primary techniques of ecological regression and extreme case analysis are supplemented by the examination of squared correlation coefficients and measures of statistical significance. The squared correlation coefficient (R^2) measures the degree to which voting for competing candidates can be predicted by knowledge of the racial composition of precincts alone. The value of R^2 varies from 0 to 1.0. Although no values arbitrarily define the distinction between "high" and "low," political analysts often rely on coefficients with values of about .25 and consider values of about .5 or greater as indicative of a strong association between variables.

[3]For individual county analyses the 80 percent cutoff is used for extreme case analysis. For the populous congressional districts, with more heavily white and heavily black precincts, the 90 percent cutoff is used.

Conventionally, social scientists accept as statistically significant results of either .05 (corresponding to a 5 in 100 probability of obtaining the results under the chance hypothesis) or the more stringent .01 (corresponding to a 1 in 100 probability of obtaining the results under the chance hypothesis). Virtually all findings of this study are statistically significant at the .01 level.

Election results for the eleventh and second congressional districts in Georgia included precincts that are split between two congressional districts. There are about 20 split precincts of some 250 precincts in District 11 and about 30 split precincts of some 270 precincts in District 2. Split precincts were treated in two ways. First, the analysis excluded the split precincts entirely, incorporating only the precincts entirely within District 11 and District 2 respectively. Unless the voting of whites and blacks in the split precincts differed fundamentally from the whites and blacks in the undivided precincts, this procedure should have little or no effect on the results of the statistical analysis.

Second, as a check on the first analysis, the voter registration in split precincts was proportionally allocated to each congressional district studied. The proportion of registration in a split precinct to be statistically allocated to a congressional district was determined by examining the ratio of the voter turnout in the split precinct to the registered voters in that precinct.[4] The

[4]If the ratio of voter turnout to registration for a given split precinct was equal to greater than the mean ratio for all undivided precincts, the entirety of the registration in the split precinct was statistically allocated to the congressional district. If that ratio for a given split precinct was below the mean ratio for all undivided precincts, only a proportion of the registration in the split precinct was statistically allocated to the congressional district. If, for example, the ratio of turnout to registration was half that of the mean ratio for undivided precincts, one-half of the registration in the precinct was allocated to the congressional district.

results from the analysis using proportionally allocated split precincts were nearly identical to the results obtained from the analysis that excluded split precincts.

RESULTS I: RACIALLY POLARIZED VOTING

The inquiry into racially polarized voting includes four levels of analysis: counties throughout the state, counties within the eleventh and second congressional districts, statewide elections partitioned within the boundaries of congressional districts 11 and 2, and 1992 congressional elections within these districts.

Ecological regression analysis of elections in counties throughout the state shows a strong pattern of racially polarized voting for about a 20 year period through 1990, involving a variety of public offices. Ecological regression analysis of more than 150 elections, reported in Appendix 1, shows high levels of black cohesion as black voters usually voted overwhelmingly for black candidates. Similarly, the ecological regression results in Appendix 1 show high levels of white bloc voting as whites voters usually voted overwhelmingly against black candidates and for their white competitors.

The findings of ecological regression analysis are corroborated by the actual results of elections in precincts that are 80 percent or more black or white, respectively, in their registered voters. Additional elections are included in the extreme case analysis because some counties with heavily white precincts did not include sufficiently concentrated populations of black registrants for ecological regression analysis.[5] The results of extreme case analysis, reported in Appendix 2 show that black candidates almost always garnered majorities in heavily black precincts, but almost always failed to do so in heavily white precincts.

The ecological regression and extreme case analyses conducted throughout the state show no diminution of racially polarized voting over time. Patterns of racially polarized voting remain strong throughout the period studied.

Similarly, patterns of racially polarized voting are strong in the particular counties included within congressional districts 11 and 2. The bulk of the counties included within districts 11 and 2 are represented in the study. The following counties included in Appendices 1 or 2 of this study are entirely or in part within District 11: Baldwin, Burke, Chatham, DeKalb, Effingham, Greene, Hancock, Henry, Jasper, Jefferson, Jenkins, Putnam, Richmond, Twiggs, Warren, Washington, Wilkes, and Wilkinson. The following counties included in Appendices 1 or 2 are entirely or in part within District 2: Baker, Bibb, Brooks, Calhoun, Clay, Crawford, Decatur, Dooly, Dougherty, Early, Grady, Houston, Macon, Marion, Meriwether, Muscogee, Peach, Quitman, Randolph, Seminole, Stewart, Talbot, Taylor, Terrell, Thomas, and Webster.

The finding of racially polarized voting is likewise strong when results of statewide black versus white elections are isolated for the precincts of congressional districts 11 and 2 respectively. The results of ecological

[5]There are also some counties for which ecological regression was performed that did not include 80%+ black or white precincts. These counties are not included in the extreme case tables in Appendix 2.

regression and extreme case analyses for statewide elections within District 11 are reported in Table 1 below. In all six elections, Table 1 shows that at least 65 percent of black voters were cohesive behind the black candidates. In 5 of 6 elections, at least 89 percent of black voters voted for the black candidates.

With respect to white bloc voting, in 5 of 6 elections, an overwhelming majority of white voters bloc voted against the black candidates. In these five elections, no more than 26 percent of white voters supported black candidates. This means that at least 74 percent of white voters bloc voted for white candidates. The only exception to this pattern is the 1992 democratic primary for Labor Commissioner, which included one white and two black candidates, one of whom was an appointed black incumbent. In that election only a small majority of white voters voted against the black candidates. In the runoff election for Labor Commissioner, however, Table 1 discloses that polarization significantly increased; only 26 percent of white voters voted for the black incumbent candidate, whereas 92 percent of black voters voted for the black candidate.

The results of ecological regression and extreme case analyses for statewide elections within District 2 are reported in Table 2 below.[6] In all five elections, Table 2 shows that at least 77 percent of black voters were cohesive behind the black candidates. In 4 of 5 elections, an overwhelming majority of white voters bloc voted against the black candidates. In these four elections, no more than 21 percent of white voters supported black candidates. This means that at least 79 percent of white voters bloc voted for white candidates. Again, the only

[6]Sufficient data was not available to include the 1984 presidential preference primary. Thus five rather than six elections are reported in Table 2.

TABLE 1: ECOLOGICAL REGRESSION AND EXTREME CASE ANALYSIS:

POLARIZATION IN STATEWIDE GEORGIA ELECTONS

PRECINCTS WITHIN BOUNDARIES OF CONGRESSIONAL DISTRICT 11

ELECTION	% BLACK VOTERS VOTING FOR BLACK CANDS	% WHITE VOTERS VOTING FOR BLACK CANDS	SQ. CORR. COEFF R^2	VOTE FOR BLACK CANDS IN 90%+ BLACK PRECS	VOTE FOR BLACK CANDS IN 90%+ WHITE PRECS
1984 DEM PRIM PRES. PREF. BLACK CAND: JACKSON WHITE CANDS: MONDALE HART 6 OTHERS	65%	0%	.76*	66%	7%
1988 DEM PRIM PRES. PREF. BLACK CAND: JACKSON WHITE CANDS: DUKAKIS GORE 4 OTHERS	95%	0%	.86*	94%	12%
1990 DEM PRIM GOVERNOR BLACK CAND: YOUNG WHITE CANDS: MILLER BARNES MADDOX MCDONALD	89%	2%	.84*	87%	12%
1990 DEM RUNOFF GOVERNOR YOUNG MILLER	93%	12%	.80*	91%	21%

TABLE 1:CONT'D: ECOLOGICAL REGRESSION AND EXTREME CASE ANALYSIS:

POLARIZATION IN STATEWIDE GEORGIA ELECTIONS

PRECINCTS WITHIN BOUNDARIES OF CONGRESSIONAL DISTRICT 11

ELECTION	% BLACK VOTERS VOTING FOR BLACK CANDS	% WHITE VOTERS VOTING FOR BLACK CANDS	SQ. CORR. COEFF R^2	VOTE FOR BLACK CANDS IN 90%+ BLACK PRECS	VOTE FOR BLACK CANDS IN 90%+ WHITE PRECS
1992 DEM PRIM LABOR COMM BLACK CANDS: JOHNSON SCOTT WHITE CAND: POYTHRESS	96%	45%	.77	93%	47%
1992 DEM RUNOFF LABOR COMM SCOTT POYTHRESS	92%	26%	.79*	89%	25%

THE ANALYSIS INCLUDES ONLY PRECINCTS ENTIRELY WITHIN EACH DISTRICT. VIRTUALLY IDENTICAL RESULTS ARE OBTAINED WHEN SPLIT PRECINCTS ARE INCLUDED AND PROPORTIONALLY ADJUSTED FOR TURNOUT. THERE ARE ABOUT 20 SPLIT PRECINCTS OF SOME 250 IN DISTRICT 11.

* RESULTS STATISTICALLY SIGNIFICANT AT .0001 LEVEL.

exception to this pattern is the 1992 Democratic primary for Labor Commissioner. In that election a small majority of white voters voted for the two black candidates. This means that at least 79 percent of white voters bloc voted for white candidates. Again, the only exception to this pattern is the 1992 Democratic primary for Labor Commissioner. In that election a small majority of white voters voted for the two black candidates. In the runoff election for Labor Commissioner, however, Table 2 discloses that polarization greatly increased, as only 21 percent of white voters voted for the black incumbent candidate, whereas 77 percent of black voters voted for the black candidate.

Finally, the black versus white Democratic primary and runoff elections for Congress in districts 11 and 2 are also polarized along racial lines. According to results reported in Table 3, the black electorate is cohesive in all four elections, as 85 percent or more of black voters supported black candidates. The results also show white bloc voting against black candidates. In 3 of 4 elections white support for black candidates was 26 percent or less. This means that 74 percent or more of white voters in these elections voted for white candidates. The only exception to the pattern of white bloc voting occurred in the District 11 primary, where 4 black candidates competed against one white candidate. In the District 11 runoff election, however, polarization increased substantially, as the black candidate garnered only 23 percent of the white vote, compared to 97 percent of the black vote.

Candidate-by-candidate analysis of the District 11 primary, reported in Table 4, shows that black candidate McKinney, one of four black candidates competing in that election, garnered 20 percent support from white voters. This placed her second among white voters to white candidate DeLoach, who garnered 45 percent

TABLE 3: ECOLOGICAL REGRESSION AND EXTREME CASE ANALYSIS: POLARIZATION IN CONGRESSIONAL ELECTIONS

1992 DEMOCRATIC PRIMARY & RUNOFF CONGRESSIONAL ELECTIONS GEORGIA CONGRESSIONAL DISTRICT 11 RESULTS BASED ON VOTER REGISTRATION DATA

ELECTION	% BLACK VOTERS VOTING FOR BLACK CANDS	% WHITE VOTERS VOTING FOR BLACK CANDS	SQ. CORR. COEFF R^2	VOTE FOR BLACK CANDS IN 90%+ BLACK PRECS	VOTE FOR BLACK CANDS IN 90%+ WHITE PRECS
DIST 11 PRIM. BLACK CANDS: MCKINNEY, WALKER THURMOND LOCKHART WHITE CAND: DELOACH	94%	55%	.27*	87%	63%
DIST 11 RUN. MCKINNEY DELOACH	97%	23%	.70*	89%	23%

TABLE 3 CONT'D: ECOLOGICAL AND EXTREME CASE ANALYSIS: POLARIZATION IN STATEWIDE GEORGIA ELECTIONS

1992 DEMOCRATIC PRIMARY & RUNOFF CONGRESSIONAL ELECTIONS GEORGIA CONGRESSIONAL DISTRICT 2 RESULTS BASED ON VOTER REGISTRATION DATA

ELECTION	% BLACK VOTERS VOTING FOR BLACK CANDS	% WHITE VOTERS VOTING FOR BLACK CANDS	SQ. CORR. COEFF R^2	VOTE FOR BLACK CANDS IN 90%+ BLACK PRECS	VOTE FOR BLACK CANDS IN 90%+ WHITE PRECS
DIST 2 PRIM. BLACK CANDS: BISHOP CUMMINGS EDWARDS KAIGLER WHITE CANDS: HATCHER WHIGHAM	88%	26%	.51*	81%	35%
DIST 2 RUN BISHOP HATCHER	85%	18%	.48*	75%	29%

THE ANALYSIS INCLUDES ONLY PRECINCTS ENTIRELY WITHIN EACH DISTRICT. VIRTUALLY IDENTICAL RESULTS ARE OBTAINED WHEN SPLIT PRECINCTS ARE INCLUDED AND PROPORTIONALLY ADJUSTED FOR TURNOUT. THERE ARE ABOUT 20 SPLIT PRECINCTS OF SOME 250 IN DISTRICT 11 AND ABOUT 30 SPLIT PRECINCTS OF SOME 270 IN DISTRICT 2.

*RESULTS STATISTICALLY SIGNIFICANT AT .0001 LEVEL.

TABLE 4: ECOLOGICAL REGRESSION ESTIMATES VOTES FOR INDIVIDUAL CANDIDATES		
1992 DEMOCRATIC CONGRESSIONAL PRIMARY DISTRICT 11		
CANDIDATE	% BLACK VOTERS VOTING FOR CANDIDATE	% WHITE VOTERS VOTING FOR CANDIDATE
MCKINNEY (B)	42%	20%
WALKER (B)	34%	11%
THURMOND (B)	14%	17%
LOCKHART (B)	4%	7%
DELOACH (W)	6%	45%

THE ANALYSIS INCLUDES ONLY PRECINCTS ENTIRELY WITHIN DISTRICT 11. VIRTUALLY IDENTICAL RESULTS ARE OBTAINED WHEN SPLIT PRECINCTS ARE INCLUDED AND PROPORTIONALLY ADJUSTED FOR TURNOUT. THERE ARE ABOUT 20 SPLIT PRECINCTS OF SOME 250 IN DISTRICT 11.

TABLE 10: ECOLOGICAL REGRESSION AND EXTREME CASE ANALYSIS; POLARIZATION IN CONGRESSIONAL ELECTIONS					
1992 DEMOCRATIC PRIMARY & RUNOFF CONGRESSIONAL ELECTIONS GEORGIA CONGRESSIONAL DISTRICT 11 RESULTS BASED ON VOTING AGE POPULATION DATA					
ELECTION	% BLACK VOTERS VOTING FOR BLACK CANDS	% WHITE VOTERS VOTING FOR BLACK CANDS	SQ. CORR. COEFF R^2	VOTE FOR BLACK CANDS IN 90%+ BLACK PRECS	VOTE FOR BLACK CANDS IN 90%+ WHITE PRECS
DIST 11 PRIM. BLACK CANDS: MCKINNEY, WALKER THURMOND LOCKHART WHITE CAND: DELOACH	94%	54%	.23*	85%	63%
DIST 11 RUN. MCKINNEY DELOACH	96%	22%	.64*	86%	24%

TABLE 10 CONT'D: ECOLOGICAL REGRESSION AND EXTREME CASE ANALYSIS; CONGRESSIONAL ELECTIONS

1992 DEMOCRATIC PRIMARY & RUNOFF – CONGRESSIONAL ELECTIONS GEORGIA CONGRESSIONAL DISTRICT 2

ELECTION	% BLACK VOTERS VOTING FOR BLACK CANDS	% WHITE VOTERS VOTING FOR BLACK CANDS	SQ. CORR. COEFF R^2	VOTE FOR BLACK CANDS IN 90%+ BLACK PRECS	VOTE FOR BLACK CANDS IN 90%+ WHITE PRECS
DIST 2 PRIM. BLACK CANDS: BISHOP CUMMINGS EDWARDS KAIGLER WHITE CANDS: HATCHER WHIGHAM	38%	27%	.44*	81%	35%
DIST 2 RUN. BISHOP HATCHER	84%	20%	.41*	76%	33%

THE ANALYSIS INCLUDES ONLY PRECINCTS ENTIRELY WITHIN EACH DISTRICT. VOTING AGE POPULATION DATA WAS NOT AVAILABLE FOR THE PRECINCTS OF RICHMOND COUNTY IN DISTRICT 11 AND THE PRECINCTS OF MACON COUNTY IN DISTRICT 2.

* RESULTS STATISTICALLY SIGNIFICANT AT .0001 LEVEL.

support from white voters. McKinney's white support increased from 20 percent in the primary to only 23 percent in the runoff, as white voters coalesced behind the white candidate. DeLoach increased his white support from 45 percent in the primary to 77 percent in the runoff election.

RESULTS II: SOCIOECONOMIC DIFFERENCES AND POLITICAL CONSEQUENCES

Examination of data from the 1990 *U.S. Census of Housing and Population* demonstrates clearly that white residents of the state of Georgia have a substantially higher socioeconomic status than black residents of the state of Georgia. Differences between whites and blacks are found for standard measures of income, occupation, and education.

Socioeconomic differences restrict the relative resources available to a politically cohesive minority group such as blacks in Georgia. Such resources include campaign finance and facilities; a recruitment base of well-educated candidates; and access to transportation and communication. Lower socioeconomic standing also constitutes a barrier to the turnout of voters as demonstrated by social science studies.[7] Ecological regression analysis of voter turnout indicates that black residents of Georgia have not been able to overcome this barrier. Participation measures generally focus on general elec-

[7]See, for example, Raymond E. Wolfinger and Steven J. Rosenstone, *Who Votes*? (New Haven: Yale University Press, 1980); Steven J. Rosenstone and John Mark Hansen, *Mobilization, Participation, and Democracy in America* (New York: Macmillan, 1993); Jan E. Leighley and Jonathan Nagler, "Individual and Systemic Influences on Turnout: Who Votes? 1984," *The Journal of Politics* 52 (1992).

tions in which all voters participate and on top-of-the-ticket contests. Ecological regression analysis of the 1988 presidential election indicates that 62 percent of white registrants voted, compared to 47 percent of black registrants. Similarly, ecological regression analysis of the 1992 presidential election indicates that 72 percent of white registrants voted, compared to 58 percent of black registrants. These differences in the turnout of registered whites and blacks, moreover, understate overall white/black turnout differences because the white voter registration rate is higher than the black voter registration rate. According to the 1990 Census, about 25 percent of Georgia's voting age population was black. But only about 22 percent of registered voters in 1988 and 1992 were black, according to state of Georgia registration statistics.

APPENDIX 1

RACIAL POLARIZATION IN GEORGIA

PRIMARY AND RUNOFF SEQUENCES, WITH BLACK CANDIDATES
SUMMARY OF FINDINGS, ECOLOGICAL REGRESSION

ECOLOGICAL REG. RESULTS

COUNTY & ELECTION	% BLACK VOTERS VOTING FOR BLACK CAND(S).	% WHITE VOTERS VOTING FOR BLACK CAND(S).	SQUARED CORRELATION COEFFICIENT (R^2)
BALDWIN COUNTY			
1990 PRIMARY			
GOVERNOR	98	8	.95
1990 RUNOFF			
GOVERNOR	100	17	.95
BIBB COUNTY			
1984 PRIMARY			
BD. OF ED.	73	6	.98
1984 RUNOFF			
BD. OF ED.	99	0	.93
1990 PRIMARY			
GOVERNOR	91	7	.98
1990 RUNOFF			
GOVERNOR	94	14	.97
DEKALB COUNTY			
1976 PRIMARY			
SENATE D. 43	85	28	.80
1976 RUNOFF			
SENATE D. 43	100	22	.83
1978 PRIMARY			
HOUSE D. 56	54	14	.80

APPENDIX 1

RACIAL POLARIZATION IN GEORGIA

PRIMARY AND RUNOFF SEQUENCES, WITH BLACK CANDIDATES
SUMMARY OF FINDINGS, ECOLOGICAL REGRESSION

ECOLOGICAL REG. RESULTS

COUNTY & ELECTION	% BLACK VOTERS VOTING FOR BLACK CAND(S).	% WHITE VOTERS VOTING FOR BLACK CAND(S).	SQUARED CORRELATION COEFFICIENT (R^2)
1982 PRIMARY			
HOUSE D. 56	41	14	.66
1984 PRIMARY			
CO COMM.	69	13	.74
SENATE D. 43	65	24	.59
APPEALS CT.	59	51	.11
DEM. PRESIDENT	60	1	.96
1984 RUNOFF			
CO COMM.	84	17	.78
SENATE D. 43	67	27	.65
1984 GENERAL			
SENATE D. 43	99	50	.96
DEKALB COUNTY			
1988 PRIMARY			
HOUSE D. 51	67	34	.32
DEM. PRESIDENT	95	14	.89
1988 RUNOFF			
HOUSE D. 51	80	17	.72

APPENDIX 1

RACIAL POLARIZATION IN GEORGIA

PRIMARY AND RUNOFF SEQUENCES, WITH BLACK CANDIDATES
SUMMARY OF FINDINGS, ECOLOGICAL REGRESSION

ECOLOGICAL REG. RESULTS

COUNTY & ELECTION	% BLACK VOTERS VOTING FOR BLACK CAND(S).	% WHITE VOTERS VOTING FOR BLACK CAND(S).	SQUARED CORRELATION COEFFICIENT (R^2)
GREENE COUNTY			
1982 PRIMARY			
HOUSE DIST. 106	61	0	.80
1982 RUNOFF			
HOUSE DIST. 106	70	0	.86
1986 PRIMARY			
HOUSE DIST. 106	89	0	.85
NEWTON COUNTY			
1990 PRIMARY			
GOVERNOR	100	0	.98
1990 RUNOFF			
GOVERNOR	100	12	.95

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COUNTY & ELECTION	% BLACK VOTERS VOTING FOR BLACK CAND(S).	% WHITE VOTERS VOTING FOR BLACK CAND(S).	SQUARED CORRELATION COEFFICIENT (R^2)
PUTNAM COUNTY			
1976 PRIMARY			
SCHOOL BOARD	43	20	.34
1976 RUNOFF			
SCHOOL BOARD	54	36	.39
1982 PRIMARY			
HOUSE D. 106	52	0	.99
1982 RUNOFF			
HOUSE D. 106	77	1	.99
1990 PRIMARY			
GOVERNOR	99	3	.99
1990 RUNOFF			
GOVERNOR	97	9	.99
TWIGGS COUNTY			
1973 PRIMARY			
ORDINARY	83	0	.88
1973 RUNOFF			
ORDINARY	93	0	.92
1990 PRIMARY			
GOVERNOR	81	0	.95
1990 RUNOFF			
GOVERNOR	93	0	.94

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ECOLOGICAL REG. RESULTS

COUNTY & ELECTION	% BLACK VOTERS VOTING FOR BLACK CAND(S).	% WHITE VOTERS VOTING FOR BLACK CAND(S).	SQUARED CORRELATION COEFFICIENT (R^2)
WARREN COUNTY			
1984 PRIMARY			
SCHOOL SUPERINTENDANT	82	0	.99
1988 PRIMARY			
SCHOOL SUPERINTENDANT	78	8	.91
WILKINSON COUNTY			
1976 PRIMARY			
BD. OF ED.	49	35	.02
1976 RUNOFF			
BD. OF ED.	80	5	.82
1982 PRIMARY			
CO COMM.	100	1	.86
1982 RUNOFF			
CO COMM.	100	7	.89
1990 PRIMARY			
GOVERNOR	80	0	.94
1990 RUNOFF			
GOVERNOR	99	4	.96

F. TESTIMONY OF RONALD E. WEBER

[Excerpt from Trial Testimony, 5 T. Tr. p. 314, line 1-p. 326, line 19]

Q Is it true, Dr. Weber, that in attempting to evaluate racial voting patterns and the opportunity for the electoral success of black preferred candidates in congressional democratic primary elections, that the most probative elections to analyze are other congressional democratic primary elections?

A If you have some. I guess—and I would add to that if you're—if you're trying to evaluate the effect—the potential effectiveness of African-American Districts, you might want to start with elections in which an African-American has competed against a non African-American. You start with that. I won't say you'll end with that. You at least want to start with that.

Q Okay. And so, you might also want to look at other democratic primary elections for state legislative or executive offices because that would involve similar dynamics? Is that correct?

A Yes, and that's why I've looked at Andrew Young versus Zell Miller. I've looked at Scott and Johnson in that primary. I looked at the runoff there. Yes.

Q And would you consider Democratic presidential preference primary elections to be somewhat less probative but probably still relevant?

A I'd say they're relevant. Yes.

Q But somewhat less so than the other elections that I mentioned?

A If you're going to have to weight things—in other words, if you're going to start assigning weights to the

average, you might discount the presidential primary a little bit. Yes.

Q Well, don't you assign weights to elections when you're deciding on elections to analyze in different cases that you've testified in?

A Yes, but I think under the—under the—under the —sort of the guidelines that your expert and I am operating under, I think we would both agree that you wouldn't exclude that election. You would analyze it.

Q I'm not asking whether you would exclude it.

A Yeah. Yeah. Yeah. Yeah.

Q I'm asking about the weight being assigned to it.

A Yeah. What I'm saying is that if you pick a period of which you're going to analyze the elections, you would choose all the elections.

Now, you might, as Dr. Lichtman does, you might say, "Well, I'm not going to analyze a certain election because the minority candidate didn't get 15% of the vote." We didn't have that here. These are all elections.

Q Right now we're talking about types of elections right now.

A Yes, sir. Yes, ma'am. Excuse me. I'm sorry.

Q I wore purple for that reason. The next category of elections, if you had some non partisan elections for legislative or executive offices, would you consider them less helpful or less probative of voting patterns in congressional primary elections?

A You'd need to note them, and you'd need to know whether or not those elections were being conducted at the same time as the primary. And for example, the

three judicial races that we included in our report are elections held at the same time as the primary.

So, the same elective that's voting in the Democratic primary is voting in those, but you also have interestingly the Republicans voting as well. So, you're getting a very conservative test that seems to me a polarization and performance of a district.

Q Well, isn't it true, Dr. Weber, that you've testified to other federal courts that in fact it's inappropriate to take judicial elections into consideration when you're looking at congressional election voting patterns?

A It depends upon the state.

Q Well, I asked you isn't that true that you've testified to that in other cases?

A Yes, but it depends on the context in each state whether you do that. In Texas, I did it. Everybody did it in Texas. The indicator that the—that the state used as one of its partisan indicators was based only on judicial elections.

Q And in Texas, judicial elections are partisan; isn't that correct?

A That's correct. Yes.

Q And—but why did you say in Louisiana, Dr. Weber, that judicial elections are totally irrelevant?

A I don't believe I said they were totally irrelevant in a congressional context. I said I didn't do that. I did not do the analysis. Or I had—the analysis was there. I did not report the analysis. Basically, most judicial elections in Louisiana are not hold at the same time as congressional elections. They're for their—it's a different electorate.

Q Isn't it true that all elections in Louisiana are held at non partisan primaries, at the same time?

A Yes, but they're not held at the same time. Most judges in Louisiana are elected in special elections held at times other than the regular elections. You have hardly any judges elected at the regular elections.

Q In Louisiana, didn't you testify, Dr. Weber, that you didn't consider judicial elections because voters have a different calculus when they go to voting for a judge than they do when voting in a congressional election?

A That's part of it. Yes.

Q And would that be any different in Georgia?

A Would they have a different cal - - -

Q Do you have any reason to believe - - -

A - - - different calculus?

Q Do you have any evidence to show that calculus difference that you testified to that somehow voters in Georgia have the same calculus in voting for judges as they do in voting in partisan congressional elections?

A Well—first of all, it's not a partisan election you're making a comparison to. It's a - - -

Q A partisan primary.

A It's a partisan primary, which only Democrats - - -

Q Right.

A People who think of themselves as Democrats run.

Q Which is a different electorate than the judicial; correct?

A Yes. But I've already admitted it. So you've got a larger electorate participating in the judicial election.

Now the question is: Are the campaigns conducted differently? Yes, they are. I'll admit to that.

Q In other words, Dr. Weber, you applied a standard pending on the particular circumstances of the case?

A No, I do not. I believe that the judicial elections in Georgia provide a reasonably good indication of how voters within the Eleventh Congressional District react to African-American versus non-African-American candidates.

Q In congressional elections?

A Not for congressional elections. You're talking about—we're talking about the district- - -

Q Well , isn't that what you're trying to analyze?

A We're talking about hub of voters. No. We're talking about hub of voters.

Q So you're not trying to analyze the opportunity of black voters to elect a member of Congress in this district?

A You use, you use the information for that purpose, yes.

Q Isn't it true, Dr. Weber, that in Louisiana, the judicial elections that were at issue generally did not involve incumbent judges? That they involved white?

A Some did. Some did.

Q And that there were many, many elections that involved black versus white challenges for an open judicial seat?

A Primarily, most of the elections in Louisiana are about open seats; yes.

Q Okay. And isn't it also true that in a Louisiana judicial election which you say are not relevant to analyzing congressional elections there, you showed fairly high levels of racial polarization if you did analyze the elections?

A Say that again to me. I'm sorry.

Q Isn't it true that in those Louisiana judicial elections which the expert witness on the other side of the case analyzed and you said were inappropriate, you had fairly high levels of racial polarization?

A We had varying levels of racial polarization depending on the part of the state.

Q Isn't it true that in this case, Dr. Weber, the judicial elections you analyzed all involved black incumbent judges who had been appointed to their position?

A I believe they've all been appointed; yes.

Q And they were incumbents when they ran for election?

A They were able to put—if they did pictures in their ads, they could put on their robes and say "re-elect the judge." Yes.

Q And they were all—each of those judges in fact has the active support of the Governor of Georgia at the time in their campaign?

A I believe they did; yes.

Q And isn't it also true that the results of those judicial elections showed substantially higher white crossover vote than the other partisan primary election that you analyzed in this case?

A Substantially higher white crossover.

Q Higher. I will take the substantial out of it.

A Not always.

Q Can you give me an example where it didn't?

A The primary in 1992 in District Eleven, a majority of non African-Americans supported the African-American candidates.

Q Well, let me ask you about that, Dr. Weber. You're talking about the initial primary.

HONORABLE JUDGE BOWEN: Ms. Murphy, I want to compliment you on the depth of your exploration, but really isn't the point made when you show us that there is indeed a distinction between a judicial election and a congressional election.

MS. MURPHY: Well, Your Honor, I'm actually moving on to a separate point now, if I may.

HONORABLE JUDGE BOWEN: Okay. Well, let that same reasoning apply analogously to the next point.

MS. MURPHY: I'll do my best.

Q (Mr. Murphy) You just mentioned the 1992 democratic primary for Congress.

A Yes, that's correct.

Q Weren't there four African-American candidates in that election?

A Yes, and one non African-American; yes.

Q And in fact in reporting your Plaintiffs' "84 F", you combined the vote totals for those four African-American candidates to look at white crossover vote; did you not?

A Yes, that's appropriate.

Q And isn't it true, Dr. Weber, that you've opined before that in fact it is improper, actually I can just read you the—read you the testimony I'm talking about.

"In order to determine who is the candidate of choice of black voters one needs to see which candidate obtained the largest share of the black votes. There is no other way to determine a group's candidate of choice and determine which candidate received more of their votes than anyone else. . ."

And then you went on to say that you agree with Dr. Lichtman's approach in that particular case, which would put all the black candidates together for purposes —you disagreed, I'm sorry.

A Yes. Disagreed, yes.

Q With Dr. Lichtman's approach?

A Yes. I think what you're doing is you're mixing apples and oranges here. In the original table in Attachment E, I have done a separate estimation.

Q Correct.

A For the purposes of summarization, I have summarized that. The raw data is in the report. The reader can easily see that and who got the first—who ran first, who ran second; all those kinds of things.

The only criticism I made of Dr. Lichtman on that is when, when you run the regression of all the candidates combined, you can't make those inferences. I mean, that's a relative minor criticism, it seems to me.

Q Well, but you're saying here—you're saying the crossover vote for the AA candidate is 55.3%. But in fact, no AA candidate in that election received a majority of the white vote; isn't that true?

A I believe that's true; yes. Yeah.

Q And I believe you testified in that same case that it was not appropriate to lump all these black candidates together in attempting to determine the candidate of choice of each racial group; isn't that true?

A And that's why I put candidates of choice, not candidate of choice.

Q So what you're saying is that when you want to look at whether or not there's racially polarized voting in a Section 2 context, you can't put the black candidates together, but in this context is okay?

A No, I'm not saying that. All I'm saying is that it is simply a function of how you summarize.

Q Exactly.

A It seemed to me it was just a simple function to summarize this way than to present all of- - -

Q So you're willing to lump all the candidates together for this purpose?

A Just for the purposes of this simple summarization.

Q Well, Dr. Weber, I'd like for you to look at Plaintiffs' Exhibit "84 F". Do you still have it in front of you?

A No, I don't.

HONORABLE JUDGE BOWEN: I think I have it.

Q I'd like for you to calculate for me, Dr. Weber the average crossover vote if we don't include the three judicial elections and we don't include the two elections in which you in fact lumped the black candidates together to determine the white crossover vote?

Do you have a calculator?

A No. I don't have a calculator to do it, because I've already done for you.

Q Oh, you have?

A Yes. I knew you were going to ask this sort of thing. All I've got to do is fine - - -

Q You should have just testified on direct. We could have saved a lot of time.

A I'm trying to find it. It's underneath my supplemental report. Give me just a moment to find it.

[Pause.]

A All right. Okay, here it is. Okay. Now, what's your question, please?

Q I'd like you to calculate the average crossover vote when you exclude the three judicial elections and the two elections where you in fact lump the black candidates together?

A Oh, I would have calculate that, because we'd now be down to one - - -

Q Five.

A - - - two, three, four, five. Okay.

Q Well, first why don't you tell me what it is when you exclude the three judicial elections? I assume that's what you calculated.

A Yes. Yes. What I did is you take the judicial elections out that crossover drops to 26.6%.

Q And what about if you take these two elections where you lump the black candidates together?

A I don't know why we're doing this, but I'm going to play along with you.

HONORABLE JUDGE BOWEN: Well, how long will it take?

A I've got to add five numbers together and divide by five.

HONORABLE JUDGE BOWEN: All right.

[Pause.]

A 17%.

Q Thank you. You mentioned a moment ago your supplemental report. In fact, your report has had three incarnations in this case; hasn't it? Your original report, your revised report, and now we have a small supplemental report that we received at the beginning of the trial last week. Is that correct?

A Yes. I made some minor revisions before the deposition and added this.

Q Do you consider those revisions minor, Dr. Weber?

A The revisions that I gave you at the deposition?

Q Yes.

A Yes, I think they were minor.

Q Well, isn't it true that you in fact did a substantially different analysis of the elections in the Eleventh Congressional District and adjusted for split precincts in your revised report?

A Yes. Yes.

Q But you hadn't done that in your original report?

A No, because I did not—when I got Dr. Lichtman's report and saw that we were getting substantially different estimates of participation, I explored why there were those differences. And I came to the conclusion

that split — treatment of split precincts made a difference in participation estimates.

Q And you determined to do an adjustment for those split precincts after reading Dr. Lichtman's report; is that correct?

A Yes.

Q And you determined that adjusting for split precincts in fact gave you more accurate results?

A For participation; not necessarily for polarization.

Q But the results you rely on, at least in comparing your summary exhibits are adjusted for split precincts; isn't that correct?

A I believe they are; yes.

Q So you consider those more reliable results in your report?

A Yes.

G. REVISED REPORT OF RONALD E. WEBER

[Plaintiffs' Exh. 82, at cover-4, 22, ¶ 39-32, ¶ 49 and Attach. E]

WILDER CRANE PROFESSOR OF GOVERNMENT
UNIVERSITY OF WISCONSIN—MILWAUKEE

June 16, 1994

INTRODUCTION

A. Background and Experience

1. My name is Ronald E. Weber and I am a resident of the State of Wisconsin.

2. I am currently the Wilder Crane Professor of Government and Chairman of the Department of Political Science at the University of Wisconsin, Milwaukee, Wisconsin; President of Campaign and Opinion Research Analysts, Inc.; and former co-editor of *The Journal of Politics*. I received my B.A. in Political Science and History from Macalester College, St. Paul, MN, in 1964 and a Ph.D. in Political Science from Syracuse University in 1969, with specialties in American state politics, voting behavior, and quantitative analyses of political data. A copy of my curriculum vitae is attached as Attachment A.

3. I am the author of numerous scholarly works on state political behavior, including several works on state legislative elections and voting behavior at the individual and aggregate levels of analysis. These works have appeared in such academic journals as the *American Political Science Review, The Journal of Politics, Midwest Journal of Political Science, Public Opinion Quarterly,* and *Legislative Studies Quarterly.*

4. I have been retained as a consultant and expert witness in a number of voting rights cases and have been qualified as an expert by the U.S. District Courts

in the Middle District (Northern and Southern Divisions) of Alabama, the Northern District (Tallahassee Division) and Middle District of Florida, the Eastern, Middle, and Western Districts of Louisiana, the District of Maryland, the District (Western Division) of Massachusetts, the Eastern District (Southern Division) of Michigan, the Northern District (Eastern and Western Divisions) of Mississippi, and the Northern District of Texas. I have given testimony by deposition in a number of cases, including a deposition for the plaintiffs in the Congressional redistricting case of *Shaw v. Reno*, n/k/a *Shaw v. Hunt* (Eastern District of North Carolina, Raleigh Division). A listing of the cases in which I have testified in Federal court or I was deposed under oath is attached as Attachment B. I also have extensive experience developing redistricting plans for local and state government clients and assisting them with preclearance of those plans under Section 5 of the U.S. Voting Rights Act of 1965, as amended in 1982.

5. I have been retained by plaintiffs in this case and am being compensated at the rate of $100 per hour plus out-of-pocket expenses.

B. Purpose of the Analysis

6. I have addressed the following questions in analyzing whether the 1992 Congressional redistricting in Georgia for the Eleventh Congressional district results in a violation of the Fourteenth and Fifteenth Amendments of the U.S. Constitution in accord with factors set forth by the U.S. Supreme Court in Shaw v. Reno:

(1) whether or not race was the overriding factor used by the State of Georgia to draw the boundaries of the Eleventh Congressional district;

(2) whether or not the Eleventh Congressional district is compact;

(3) whether or not the Eleventh Congressional district violates other traditional districting criteria;

(4) whether or not voting patterns in recent Democratic primary, runoff, and general elections held within the boundaries of the Eleventh Congressional district reveal patterns of participation differences between African-Americans and non-African Americans and racially polarized voting, and, if so, to what extent;

(5) whether or not the Eleventh Congressional District is overly safe from the standpoint of assuring the election of a candidate of choice of African-American voters;

(6) whether or not more narrowly tailored plans were or can be created for an Eleventh Congressional district that can achieve the same electoral results as the state plan that are less violative of traditional districting criteria; and

(7) whether or not the state plan for the Eleventh Congressional district results in a maximization of African-American representation in the Georgia congressional delegation.

7. In attempting to assist the court in addressing these questions, I have undertaken an analysis of data reported in the State of Georgia's 1991-92 preclearance submissions to the U.S. Department of Justice, as well as other demographic and electoral data. The results of my analysis to date will be presented in this report in the following form: in section I, I will describe the analyses conducted to answer the first three questions and set forth my conclusions on those questions; in Section

II, I will describe the electoral database employed, my analytical methodology for the participation and polarization analyses, and set forth my conclusions based upon the application of this methodology to this database; and in section III, I will describe the analyses conducted to answer the last two questions and set forth my conclusions on those questions. Tables and exhibits relevant to my analyses will be included as attachments to this report.

2. Racial Polarization in Voting

39. I also analyzed the eleven contested general elections for U.S. Congress in 1992 in Georgia to determine the patterns of racially polarized voting within each district (see Attachment E). In the seven district elections for which valid African-American voter behavior estimates can be obtained, the African-American voters display cohesive support for the Democratic nominee in each district. In the Eleventh Congressional district, the African-American voters give an estimated 96 percent of their support to the Democratic party nominee, Cynthia McKinney. In the other two majority African-American districts, the African-American voters give between 93 and 100 percent of their support to African-American Democratic nominees in the general election. In the eight non-African-American majority districts, the non-African-American voters give a majority of their support to Republican nominees in six of the eight districts. In only the Seventh and Ninth districts do non-African-Americans give a majority of their support to Democratic nominees. Non-African-American voters in the three African-American majority districts act similarly to non-African-American voters in other districts, giving a majority of their support to Republican

nominees. The non-African-American cross-over vote in the African-American majority districts ranges from about 23 percent in the Second district to 44 percent in the Fifth district. The estimated figure for the Eleventh Congressional district is 28.6 percent.

40. I also analyzed the Democratic primary and runoff primary results for Congress in 1992 in the precincts contained in the three African-American majority Congressional districts of Georgia to determine the patterns of racial polarization in voting in those elections. In the Democratic primary in the Eleventh Congressional district, Cynthia McKinney was the plurality choice of African-American voters with an estimated 40-41 percent level of support, while George Deloach was the plurality choice of non-African-American voters with an estimated level of support of 44-45 percent. The combined vote for the four African-American candidates was an estimated 55-56 percent of the vote cast by non-African-Americans, indicating a low level of racial polarization in voting in that election. In the Democratic runoff primary, African-Americans were cohesive in their support of Cynthia McKinney, giving her an estimated 90-96 percent level of support. Her cross-over support from non-African-Americans was estimated at 23-24 percent. With the combination of African-American and non-African-American support, she captured over 55 percent of the vote. Therefore, no legally or politically consequential racial polarization in voting occurred in that election.

41. In the Second Congressional district, African-Americans gave plurality support to Sanford Bishop at an estimated level of 31.7 percent in the Democratic primary. Charles Hatcher, the incumbent Congressman, was the choice of non-African-Americans, at an estimated level of support of 66.4 percent. In the runoff

primary, Bishop was the choice of African-Americans receiving an estimated level of support of 70.5 percent. His cross-over support from non-African-Americans was an estimated 22.3 percent. Bishop was the victor in the runoff primary, thus resulting in no legally or politically consequential racial polarized voting. In the Democratic primary for the Fifth Congressional district, John Lewis, the incumbent, was the choice of both African-American and non-African-American voters.

42. I also analyzed the Democratic primary runoff results in 1990 for Governor and the Democratic primary results in 1988 for President in the precincts contained in the three African-American majority Congressional districts of Georgia to determine the patterns of racial polarization in voting in those elections. African-American voters give cohesive support to Andrew Young, the former Congressman and Mayor of Atlanta, in the Democratic runoff for Governor in 1990 in the Eleventh, Second, and Fifth Congressional districts, with the African-American crossover vote running as high as an estimated 18.3 percent in the Fifth Congressional district. Cross-over voting from non-African-Americans in the three Congressional districts ranges from a high of about 35 percent in the Fifth district to lows of eight to eleven percent in the Second and Eleventh districts respectively. While the 1990 Democratic runoff election results indicate some racial polarization in voting, the cross-over voting by each group negates legally or politically consequential racial polarized voting in each district.

43. African-American voters also gave cohesive support to Jesse Jackson in the Democratic Presidential Preference primary in 1988 with the African-American crossover vote running about an estimated six to seven percent in the three African-American majority

Congressional districts. Cross-over voting from non-African-Americans in the three Congressional districts was minimal, with the election results indicating some racial polarization in voting. The net effect of participation patterns of the two groups in the election, with the African-American voters participating at a higher rate than non-African-Americans, advantaged the African-American voters thus making the presence of racial polarization in voting of no legal or political consequence.

44. I have also analyzed the patterns of racial polarization in voting in the 1992 Democratic primary and runoff elections for the state Commissioner of Labor within the precincts contained in the three African-American majority Congressional districts. In the Eleventh Congressional district, African-Americans were cohesive in support of African-American candidate Scott in the Democratic primary election. Non-African-Americans gave a slight majority of their support to Poythress the non-African-American candidate in the election. In the runoff primary, Scott received cohesive support from African-American voters while non-African-American cross-over support for Scott was estimated at about 27 percent. Although there is evidence of some racial polarization in voting in this contest, it is not legally or politically consequential because the candidate preferred by African-American voters wins within the boundaries of the Eleventh Congressional district. Neither African-Americans nor non-African-Americans display cohesive patterns in racial polarization in voting in the Democratic primary for state Commissioner of Labor in the Second Congressional district. Scott is preferred by a majority of African-American voters, while Poythress is supported by a plurality of non-African-Americans within the district. Voting is somewhat racially polarized in the

runoff election in the Second Congressional district, with Poythress winning the election within the precincts in the district. No legally or politically consequential racial polarization in voting occurs in the state Commissioner of Labor elections held within the precincts of the Fifth Congressional district in that in both the Democratic primary and runoff elections, Scott who is supported by African-American voters would have been the winner of the election.

45. I have also analyzed the patterns of racial polarization in voting in the three recent statewide non-partisan elections for the state judiciary within the precincts contained in the three African-American majority Congressional districts. These are three elections in which African-American candidates were elected to full terms on Georgia's Supreme Court or Court of Appeals. These non-partisan elections were held at the time of the primary elections in July. In the Eleventh Congressional district, African-Americans were cohesive in support of the African-American candidates in all three elections. Cross-over support by non-African-Americans played a major role in all three elections, with Robert Benham receiving a majority of non-African-American support in the 1990 election for Supreme Court justice. Non-African-American support for the other two African-American candidates was strong also with Leah Sears-Collins receiving an estimated 42.3 percent in the 1992 election and Clarence Cooper obtaining an estimated 44.5 percent support in the 1990 election. Racial polarization in voting does not occur in the 1990 Supreme Court election since both groups favor the same candidate. And the degree of racial polarization in voting is low in the other two judicial contests. Legally or politically consequential racial polarization in voting does not occur in that the candidates preferred by

African-American voters win all three elections held within the boundaries of the Eleventh Congressional district. A similar pattern in racial polarization in voting also occurs in the Second Congressional district. The 1990 Supreme Court election is not polarized, while the other two elections display low levels of polarization. Again the polarization in the two elections has no legal or political consequence as the candidates of choice of African-Americans prevail. No racial polarization in voting occurs in the three judicial elections held within the precincts of the Fifth Congressional district in that the two groups support the same candidate of choice.

46. I have also analyzed the pattern of voting in several 1986, 1990, and 1992 Democratic primary and runoff elections for State Senate and House seats held within the precincts contained in the Eleventh Congressional districts to determine the extent of racial polarization in voting in sub-regions of the district. In the most recent Democratic primary elections of 1992, voting was somewhat polarized for the 22nd State Senate District (Burke and Richmond Counties), the 66th State House District (DeKalb County), the 111th State House District (Green, Putnam, Taliaferro, and Wilkes Counties), and the 116th State House District (Richmond County). Voting was not polarized in the Democratic primary for State Senate District 55 (DeKalb County) because the candidate preferred by both groups was victorious. The racially polarized voting was legally or politically consequential in only one district election in 1992—the runoff primary in House District 66 (DeKalb County) where the candidate preferred by a majority of non-African-Americans won. (However, the African-American participation in that runoff primary was so low even cohesion behavior by those African-Americans voting was insufficient to elect a candidate of choice.) A lack of African-American cohesion in the 111th House District resulted in the defeat of the candidate preferred by African-American voters in that year.

47. My analyses of the two elections from 1990 indicate a pattern of some racial polarization in voting in both elections. The candidate of choice of African-Americans was elected in State House District 56 (DeKalb County) despite racial polarization in voting. Thus, the racial polarization in voting was legally or politically consequential only in State Senate District 22 (Richmond County). However, that State Senate District was not majority African-American in total or voting age population at that time and the patterns of participation and voting by the two groups were insufficient to produce a win for the candidate of choice of African-American voters. The analyses of the three State House elections from 1986 indicate that voting was somewhat racially polarized in Districts 106 and 116 and not polarized in District 56. The pattern of racial polarization in voting was not legally or politically consequential in Districts 106 and 116 since the preferred candidate of African-Americans won both elections.

48. The analyses of racial polarization in voting in the different recent elections held within the boundaries of the Eleventh Congressional district indicate that some racial polarization in voting occurs, but for the most part the racial polarization in voting is not legally or politically consequential. Candidates of choice of African-American voters won all contests for the Congressional office in 1992, won the Democratic runoff for Governor in 1990, won the Democratic Presidential Preference primary in 1988, and won the Democratic runoff for state Commissioner of Labor in 1992, and won the three positions on the state judiciary in 1990 and 1992. In the selected elections for State Senate and State House

positions, candidates preferred by African-Americans lost only two times when the African-American group was cohesive in the election—Senate District 22 in 1990 and House District 66 in 1992. In the remaining eight other elections for State Senate or House positions, the level of racially polarized voting was not legally or politically consequential.

3. Reconstituted Election Return Analysis

49. Using actual precinct-level returns for the 1988, 1990, and 1992 elections analyzed above, it is possible to reconstitute the results of state elections into the boundaries of the Congressional districts adopted by Georgia in 1992. These reconstituted results for the 1990 Democratic runoff primary for Governor and the 1988 Democratic Presidential Preference primary indicate that the African-American preferred candidates Andrew Young (1990) and Jesse Jackson (1988) would have been the winners of those elections in the Eleventh Congressional district as well as the Second and Fifth Congressional districts if the elections were held only within the boundaries of the 1992 Congressional districts (see Attachment F). In addition, I have reconstituted the results of the 1990 and 1992 state judicial contests as well as the two 1992 state Commissioner of Labor elections to see how African-American preferred candidates fared within the precincts of the three Congressional districts. The results of the three state judicial contests reconstituted to the precincts of the three African-American majority Congressional districts indicate that all three African-American candidates win the three Congressional districts, with the winning percent being quite comfortable in the Eleventh Congressional district. In the reconstituted results for the state Commissioner of Labor

Democratic primary election, Scott wins a majority of the vote in the Democratic primary in the Eleventh and Fifth Congressional districts while winning a plurality of the vote in the Second Congressional district. In the runoff election, Scott is elected in the Eleventh and Fifth Congressional districts, while losing in the Second Congressional district. These analyses reveal that the candidates preferred by African-Americans often achieved very comfortable margins of victory in each of the contests held within the precincts in the Eleventh Congressional district. The patterns of group participation, African-American cohesion, and non-African-American cross-over voting all contributed to these margins of victory.

STATE OF GEORGIA

1992 Democratic Run-Off
11th Congressional District
(% Of REG)

Weighted Candidate	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
Deloach	.021 (9.3%)	.205 (77.1%)	-.440**	.19
McKinney (B) +	.204 (90.7%)	.061 (22.9%)	.496**	.25
	.225	.266		

Extreme Cases	*Candidate*	*Black Vote*	*Nonblack Vote*
	Deloach	.025 (12.0%)	.134 (76.6%)
	McKinney (B) +	.184 (88.0%)	.041 (23.4%)
		.209	.175

Un-Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Deloach	.023 (10.5%)	.233 (79.0%)	-.466**	.22
	McKinney (B) +	.196 (89.5%)	.062 (21.0%)	.455**	.21
		.219	.295		

(B) denotes black candidate

+ denotes winner

** Statistically significant at the .01 level

STATE OF GEORGIA

1992 Democratic Run-Off, 11th Congressional District
Adjusted for Split Precincts
(% Of REG)

Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Deloach	.009 (4.3%)	.247 (76.0%)	-.543**	.29
	McKinney (B) +	.199 (95.7%)	.078 (24.0%)	.419**	.18
		.208	.325		

Extreme Cases	*Candidate*	*Black Vote*	*Nonblack Vote*
	Deloach	.026 (12.1%)	.197 (76.7%)
	McKinney (B) +	.188 (87.9%)	.060 (23.3%)
		.214	.257

Un-Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Deloach	.022 (10.1%)	.250 (77.9%)	-.508**	.26
	McKinney (B) +	.195 (89.9%)	.071 (22.1%)	.426**	.18
		.217	.321		

(B) denotes black candidate

+ denotes winner

** Statistically significant at the .01 level

STATE OF GEORGIA

1992 11th Congressional District
1990 Democratic Run-Off for Governor
(% Of REG)

Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Miller	.049 (10.4%)	.294 (89.1%)	-.576**	.33
	Young (B) +	.420 (89.6%)	.036 (10.9%)	.737**	.54
		.469	.330		

Extreme Cases	*Candidate*	*Black Vote*	*Nonblack Vote*
	Miller	.054 (11.3%)	.287 (81.1%)
	Young (B) +	.426 (88.7%)	.067 (18.9%)
		.480	.354

Un-Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Miller	.098 (16.9%)	.307 (99.4%)	-.291**	.08
	Young (B) +	.483 (83.1%)	.002 (0.6%)	.483**	.23
		.581	.309		

(B) denotes black candidate

+ denotes winner

** Statistically significant at the .01 level

STATE OF GEORGIA

1992 11th Congressional District
1988 Democratic Presidential Preference Primary
(% Of REG)

Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	White				
	Democrats	.024 (5.9%)	.151 (105.6%)	-.779**	.61
	Jackson (B) +	.380 (94.1%)	-.008 (-5.6%)	.905**	.82
		.404	.330		

Extreme Cases	*Candidate*	*Black Vote*	*Nonblack Vote*
	White		
	Democrats	.025 (6.1%)	.148 (80.9%)
	Jackson (B) +	.386 (93.9%)	.035 (19.1%)
		.411	.183

Un-Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	White				
	Democrats	.026 (6.5%)	.157 (105.4%)	-.736**	.54
	Jackson (B) +	.373 (93.5%)	-.008 (-5.4%)	.873**	.76
		.399	.149		

(B) denotes black candidate

+ denotes winner

** Statistically significant at the .01 level

STATE OF GEORGIA

1992 Democratic Run-Off for Commissioner of Labor
11th Congressional District
(% Of REG)

Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Poythress	.018 (8.3%)	.223 (72.9%)	-.552**	.30
	Scott (B) +	.199 (91.7%)	.083 (27.1%)	.401**	.16
		.217	.306		

Extreme Cases	*Candidate*	*Black Vote*	*Nonblack Vote*
	Poythress	.023 (10.6%)	.182 (73.1%)
	Scott (B) +	.194 (89.4%)	.067 (26.9%)
		.217	.249

Un-Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Poythress	.019 (8.7%)	.235 (73.7%)	-.543**	.30
	Scott (B) +	.199 (91.3%)	.084 (26.3%)	.378**	.14
		.218	.319		

(B) denotes black candidate
+ denotes winner
** Statistically significant at the .01 level

STATE OF GEORGIA

1992 Non-Partisan Election for Supreme Court Justice
11th Congressional District
(% Of REG)

Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Boswell	.029 (12.4%)	.135 (57.7%)	-.492**	.24
	Sears-Collins (B) +	.205 (87.6%)	.099 (42.3%)	.344**	.12
		.234	.234		

Extreme Cases	*Candidate*	*Black Vote*	*Nonblack Vote*
	Boswell	.031 (15.3%)	.132 (55.5%)
	Sears-Collins (B) +	.171 (84.7%)	.106 (44.5%)
		.202	.238

Un-Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Boswell	.023 (11.8%)	.162 (55.9%)	-.296**	.09
	Sears-Collins (B) +	.172 (88.2%)	.128 (44.1%)	.089	.01
		.195	.290		

(B) denotes black candidate
+ denotes winner
** Statistically significant at the .01 level

STATE OF GEORGIA

1990 Non-Partisan Election for Supreme Court Justice
1992 11th Congressional District
(% Of REG)

Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Benham (B) +	.155 (74.5%)	.133 (59.4%)	.077**	.01
	Salter	.053 (25.5%)	.091 (40.6%)	-.247**	.06
		.208	.224		

Extreme Cases	*Candidate*	*Black Vote*	*Nonblack Vote*
	Benham (B) +	.130 (75.1%)	.124 (58.8%)
	Salter	.043 (24.9%)	.087 (41.2%)
		.173	.211

Un-Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Benham (B) +	.136 (75.6%)	.126 (58.3%)	.035	.00
	Salter	.044 (24.4%)	.090 (41.7%)	-.276**	.08
		.180	.216		

(B) denotes black candidate
+ denotes winner
** Statistically significant at the .01 level

STATE OF GEORGIA

1990 Non-Partisan Election for Court of Appeals
1992 11th Congressional District
(% Of REG)

Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Blackburn	.041 (18.9%)	.117 (55.5%)	-.501**	.25
	Cooper (B) +	.176 (81.1%)	.094 (44.5%)	.250**	.06
		.217	.211		

Extreme Cases	*Candidate*	*Black Vote*	*Nonblack Vote*
	Blackburn	.031 (18.1%)	.100 (52.6%)
	Cooper (B) +	.140 (81.9%)	.090 (47.4%)
		.171	.190

Un-Weighted	*Candidate*	*Black Vote*	*Nonblack Vote*	*Corr. Coef.*	R^2
	Blackburn	.039 (21.5%)	.116 (55.2%)	-.410**	.17
	Cooper (B) +	.142 (78.5%)	.094 (44.8%)	.159*	.03
		.181	.210		

(B) denotes black candidate
+ denotes winner
* Statistically significant at the .05 level
** Statistically significant at the .01 level

H. JOINT STATEMENT OF UNDISPUTED FACT

3. The 1990 Decennial Census reports that the State of Georgia's population is 6,478,216 persons of whom 1,746,565 (26.96%) are black persons. Abrams Exhibit 1.

4. The total voting age population of Georgia is 4,750,913, of which 3,490,414 (73.5%) are white and 1,168,142 (24.6%) are black. 1990 Census, Table 1, at p. 1. Abrams Exhibit 1.

61. The members of the Georgia House of Representatives are elected from 180 single-member districts. Of those districts 42 have a majority black total population and 138 have a majority white total population. Thirty of the 42 (71.4%) majority-black districts are represented by black members and 12 of the 42 (28.6%) are represented by white members. Of the 138 majority-white House districts, one (0.7%) is represented by a black member. Exhibits U.S. 57, Abrams 24.

62. Thirty of the thirty-one (96.8%) black members of the House are elected from majority-black districts. Exhibits U.S. 57, Abrams 24.

63. The members of the Georgia Senate are elected from 56 single-member districts. Of those districts 13 have a majority black total population and 43 have a majority white total population. Nine of the thirteen (69.2%) majority-black districts are represented by black members and four of the 13 (30.8%) are represented by white members. Of the 43 majority-white Senate districts, none are represented by a black member. Exhibits U.S. 57, Abrams 23.

64. One hundred percent of the black members of the Georgia Senate are elected from majority-black districts. Exhibits U.S. 57, Abrams 23.

VOTING HISTORY

76. In 1908, the Georgia General Assembly passed a proposed amendment to the Georgia Constitution to prescribe the qualifications for electors and provide for the registration of voters. The proposed amendment established requirements for eligibility to vote, including state and county residence requirements, payment of taxes due, and satisfaction of one of the following: honorable service in one of several specified wars, a descendent of the former, good character and understanding of the duties and obligations of citizenship under a republican form of government, ability to read and write any paragraph of the United States or Georgia Constitution (with a proviso for those unable to do so because of physical disability), or ownership of property of a specified character. In the published, written version of the June 24, 1908 message of Governor Hoke Smith to the Georgia General Assembly, the remarks concerning the aforesaid proposed amendment are reported under the heading "Disfranchisement Act." No such amendment is in force in Georgia.

77. The poll tax was a feature of Georgia electoral law in the years immediately prior to 1945, but it was not in 1945 and thereafter.

78. Between 1900 and 1944, the democratic primary was a part of the political process that existed in the state, and blacks were excluded therefrom. Exclusion from the democratic primary did not, however, exclude black persons from voting in any other elections, including general elections, non-partisan candidate elections, special elections, referenda, bond elections, republican primaries and the like.

79. The district court in *King v. Chapman*, 62 F. Supp. 639 (M.D. Ga. 1945), *aff'd*, 154 F.2d 460 (5th Cir.), *cert.*

denied, 327 U.S. 800 (1946), found unconstitutional the exclusion of black citizens from participation in the Democratic primary election in Muscogee County, Georgia, which exclusion had been pursuant to a Democratic party rule of state-wide applicability. Said rule has not been in force since 1946.

80. The district court in *King v. Chapman* found that "[t]he Democratic Party is the dominant and controlling political party in Georgia. No other party has held a statewide primary during the past 40 years. Since 1900 Democratic nominees for United States Senator, members of the House of Representatives, Governor and other Statehouse officers, nominated at primaries, have been elected in the ensuing general election." During the time referred to in the quotation, a candidate winning in the Democratic primary for the offices listed in the quotation usually went on to win in the general election, although there was no Democratic primary for many elections, such as general elections, special elections, non-partisan elections and various referenda.

81. Generally speaking, more blacks were registered and voted in the State of Georgia in the years after the *King v. Chapman* decision than before. The number of black voters has generally increased in the state over the years.

82. In 1949, following the abolition of the white Democratic primary in 1945 and the election of Herman Talmadge as Governor in November 1948, the Georgia General Assembly enacted a "Voters' Registration Act." The 1949 Voters' Registration Act, among other things, declared existing registration lists null and void (except for special elections held prior to the next general election), required the re-registration of voters, and required further that citizens vote at least once in every

two years to maintain voter eligibility. This Act was repealed by 1958.

83. Under the 1949 Voter's Registration Act, voters could qualify to register to vote by demonstrating an ability to read and write (this requirement could be satisfied if the applicant was unable to read solely because of physical disability), or by reason of good character and understanding of the duties and obligations of citizenship under a Republican form of government by answering 10 of 30 questions. These provisions are no longer in force in Georgia.

84. The Georgia General Assembly in 1950 enacted legislation, which, among other things, permitted voters who had registered under prior provisions of Georgia law, i.e., those registered prior to 1949, to remain eligible to vote under certain circumstances. These provisions are no longer in force in Georgia.

85. In 1958, the Georgia General Assembly passed a "Voters Registration Act" which readopted some of the provisions of the 1949 Voters Registration Act, and, among other things, required for those illiterate persons seeking to register that 20 of 30 questions be answered correctly. These provisions are no longer in force in Georgia.

86. For some years prior to April 28, 1962, the State of Georgia operated under a county unit system for determining the nominees in primary elections for United States Senator and state officers elected on a state-wide basis, including justices of the Georgia Supreme Court and judges of the Georgia Court of Appeals.

87. Under the county unit system these nominations were not determined on the basis of popular vote. Rather, prior to 1962, each county was assigned a cer-

tain number of "units" based on the number of representatives elected to the lower House of the Georgia legislature from the county, and a candidate for one of the offices listed in the previous request for admission won a county's unit votes by receiving a plurality of the popular votes cast in that county for that office.

88. The effect of the county unit system was generally to attribute certain representation and political influence to counties, in part regardless of their population, and some part of the consequence of that system was to give equal or proportionately greater representation on a per capita basis to the less populated, rural counties.

89. As late as 1962, Democratic Party rules in Georgia allowed the Democratic Executive Committee of each congressional district to decide whether to employ the county unit system or a popular election plan for the primary nomination of candidates for Congress. *Rules and Regulations of the State Democratic Executive Committee of Georgia* (Adopted April 18, 1962), at 20-21. An authentic copy of this document is Exhibit U.S. 53.

90. According to historian James C. Bonner, whose affidavit was filed on behalf of the plaintiff in *Sanders* v. *Gray*, 203 F. Supp. 158 (N.D. Ga. 1962), supporters of the county unit system characterized it as a barrier against the "bloc vote" and "race mixing," and as a bulwark for defense of "the Southern way of life." James C. Bonner, "Legislative Apportionment and County Unit Voting in Georgia Since 1777," *Georgia Historical Quarterly*, XLVII, 351-74, at 370 (December 1963).

91. According to historian Numan V. Bartley, support for the county unit system was correlated with support for racial discrimination. "Conservatives consistently supported the protection and promotion of the county

unit system in politics and white supremacy in the social order." Numan V. Bartley, *From Thurmond to Wallace: Political Tendencies in Georgia. 1948-1968*, 22 (Baltimore, Md., The Johns Hopkins University Press, 1970).

92. According to historian Numan V. Bartley, Congressman James C. Davis of the Fifth district was a well-known advocate of racial discrimination: "Davis possessed a reactionary voting record in the House of Representatives and was a fiery proponent of the virtues of white supremacy." Numan V. Bartley, *From Thurmond to Wallace: Political Tendencies in Georgia. 1948-1968*, 52 (Baltimore, Md., The Johns Hopkins University Press, 1970).

93. Historian Numan V. Bartley has described Charles Weltner's politics in the following terms: "Weltner espoused a generally progressive program that contrasted sharply with Davis' congressional record and campaign oratory." Numan V. Bartley, *From Thurmond to Wallace: Political Tendencies in Georgia. 1948-1968*, 52 (Baltimore, Md., The Johns Hopkins University Press, 1970).

94. In 1964, the state of Georgia was required by the U.S. Supreme Court to reapportion its congressional districts in accordance with the one person, one vote principle. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

95. In April, 1962, a three-judge district court enjoined the State of Georgia's use of the county unit system, as it was then implemented. *Sanders v. Gray*, 203 F. Supp. at 171. On appeal, the Supreme Court struck down the county unit system in Georgia as violative of the one-person, one-vote rule. *Gray v. Sanders*, 372 U.S. at 376-81 (1963).

96. On June 24, 1964, the State of Georgia enacted a voting code which established, comprehensive voting procedures, mechanisms and requirements applicable uniformly throughout the state. The law required candidates for nomination or election to federal, state and county offices in Georgia to obtain a majority of the votes cast to win the nomination for public office. If no candidate receives a majority of the vote, the candidates with the two highest number of votes run again in a run-off primary or election. A designated post requirement for some types of offices was also adopted in the same legislation.

97. During the spring of 1964, Donald L. Hollowell, a black attorney in Atlanta, filed to run for a superior court judgeship in the September 1964 primary in Fulton County, a county in which superior court judges could win the primary nomination by a plurality of the vote. However, by virtue of the adoption of the majority vote law in June of 1964, the primary was held using a majority vote requirement instead of the previously required plurality.

98. The Voting Rights Act of 1965 had the effect of suspending the State of Georgia's use of the literacy test requirement for voter eligibility, although the provision still appeared in Article II, §I, Para. III of the Constitution of the State of Georgia of 1976. The provision was removed from Georgia's 1983 Constitution.

99. According to a 1968 Report of the U.S. Commission on Civil Rights, *Political Participation*, pp. 12-13 (May 1968), there were 1,124,415 whites registered in the State of Georgia as of December 1962, and there were 167,663 non-whites registered to vote in the Georgia at the time. As of August 31, 1967, there were 1,443,730 whites registered to vote in Georgia and

332,496 non-whites registered to vote. An authentic copy of the relevant pages of this publication is Exhibit U.S. 54.

100. By statute enacted in 1966, the State of Georgia restricted a person from assisting more than one illiterate voter during an election. This statute was held unconstitutional in *Morris v. Fortson*, 261 F. Supp. 538, 541 (N.D. Ga. 1966).

101. In 1968, Georgia passed a purge law pertaining to municipalities maintaining their own registration systems. The law required the municipal registrar at specified times to remove from the voter list electors who (1) had neither voted during the previous three years nor requested continuation of registration, (2) had been convicted of a crime constituting a disqualification from voting, (3) had been adjudicated insane, or (4) had died. In the same year, Georgia passed a law pertaining to municipalities maintaining their own registration systems, which required the establishment of a central office, and such other places as the municipality might designate, at which voter registration could be conducted.

102. Courts have found racial bloc voting in Georgia in certain elections in Bleckley County, *Hall v. Holder*, 955 F.2d 1563 (11th Cir. 1992), *cert. granted;* Burke County, *Lodge v. Buxton*, 639 F.2d 1358, 1378 (5th Cir. 1981); Carroll County, *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1559 (11th Cir. 1987); Colquitt County, *Cross v. Baxter*, 604 F.2d 875, 880 n.8 (5th Cir. 1979); Dougherty County, *Paige v. Gray*, 437 F.Supp. 137, 158 (M.D.Ga. 1977); Fulton County, *Pitts v. Busbee*, 395 F.Supp. 35, 40 (N.D.Ga. 1975); Putnam County, *Bailey v. Vining*, 514 F.Supp. 452, 461 (M.D.Ga. 1981); and Wilkes County, *Wilkes County, Georgia v. United*

States, 450 F.Supp. 1171, 1174 (D.D.C. 1978). Fulton and DeKalb Counties. *Busbee v. Smith*, 549 F. Supp. 494, 499 (D.D.C. 1982) (three-judge court), *aff'd*, 459 U.S. 1166 (1983).

103. In each of the following counties and municipalities, located in whole or in part in the present Eleventh Congressional District, voting rights litigation against the jurisdiction resulted in changes in the challenged electoral system(s) and/or judicial findings of racial bloc voting: Baldwin County, *Boddy v. Hall*, Civil Action No. 82-406 (M.D.Ga. 5/17/84, 6/7/84) (Abrams Exhibits 2 and 3); City of Milledgeville, *NAACP v. City of Milledgeville*, Civil Action No. 83-145-01 (M.D.Ga. 6/30/83) (Abrams Exhibit 4); Burke County, *Lodge v. Buxton*, 639 F.2d 1358, 1378 (5th Cir. 1981) *aff'd sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982); Effingham County, *Local Organization for Voters Equality v. Conaway*, Civil Action No. CV484-39 (4/16/84) (Abrams Exhibit 5); Butts County, *Brown v. Bailey*, Civil Action No. 84-223 (M.D.Ga. 1984) (Abrams Exhibit 6); Greene County, *Bacon v. Higdon*, Civil Action No. 85-40-ATH (M.D.Ga. 1/10/86) (Abrams Exhibit 7); Henry County, *Head v. Henry County Board of Commissioners*, Civil Action No. C-79-2063A (N.D.Ga. 7/17/80) (Abrams Exhibit 8); Jefferson County, *Tomlin v. Jefferson County Board of Commissioners*, Civil Action No. CV683-23 (S.D.Ga. 9/29/83) (Abrams Exhibit 9); Jenkins County, *Greene v. Bragg*, Civil Action No. 691-078 (S.D.Ga. 10/4/93) (Abrams Exhibit 10); Putnam County, *Bailey v. Vining*, Civil Action No. 76-199-MAC (M.D.Ga. 4/5/82, 4/22/82) (Abrams Exhibits 11 and 12); Putnam County, *Bailey v. Vining*, 514 F.Supp. 452, 461 (M.D.Ga. 1981); Richmond County, *Hamilton v. Board of Commissioners of Richmond County, Georgia*, Civil Action No. CV178-226 (S.D.Ga. 1984) (Abrams Exhibit

13); City of Augusta, *United States v. City Council of Augusta, Georgia*, Civil Action No. CV187-004 (S.D.Ga. 7/22/88) (Abrams Exhibit); Screven County, *Culver v. Krulic*, Civil Action No. 484-139 (S.D.Ga. 11/6/84) (Abrams Exhibit 15); Screven County, *United States v. Screven County, Georgia*, Civil Action No. CV692-154 (S.D.Ga. 12/16/92) (Abrams Exhibit 30); Twiggs County, *Bond v. White*, 377 F.Supp. 514 (M.D.Ga. 1974); Wilkes County, *Wilkes County, Georgia v. United States*, 450 F.Supp. 1171, 1174 (D.D.C. 1978); City of Waynesboro, *Sullivan v. DeLoach*, Civil Action No. CV176-238 (S.D.Ga. 9/22/77) (Abrams Exhibit 16); City of Warrenton, *Warren County Branch of the NAACP v. Haywood*, Civil Action No. CV-187167 (S.D.Ga. 8/10/89) (Abrams Exhibit 17).

SEGREGATED EDUCATIONAL INSTITUTIONS

104. The 1945 Amendment to the Constitution of the State of Georgia continued, *inter alia*, the then existing requirement of segregated public schools and the Georgia General Assembly enacted legislation requiring segregated common schools and providing, among other things, that "no teacher receiving or teaching white and colored pupils in the same schools shall be allowed any compensation out of the common school fund." Both of these provisions were subsequently abolished.

105. In 1945, the Georgia General Assembly passed a proposed Constitutional Amendment pertaining to endowments to educational institutions open to the public. The proposed amendment stated, among other things, "that all endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people shall be limited to colored people." These provisions are no longer in force in Georgia.

106. The Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), held that segregation of white and Negro children in the public schools of a state solely on the basis of their race, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment.

107. Following the Supreme Court's decision in *Brown v. Board of Education*, the Georgia General Assembly in 1955 passed a resolution declaring that the federal government had "greatly encroached, directly and indirectly, upon the operation of State schools," and encouraged the United States Congress to convene a constitutional convention for the purpose of amending the United States Constitution to state that "nothing shall, in any way, take away from, or in any manner deprive, the right of the several States of the Union to operate their school systems, and to have exclusive and complete power to regulate and to determine the rules and regulations for the conduct and operation of State schools." The United States Congress took no such action.

108. Following the Supreme Court's school desegregation decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Brown v. Board of Education (No. II)*, 349 U.S. 294 (1955), the Georgia General Assembly in 1956 passed a resolution which expressed the view that Georgia had neither "surrendered to the General Government its right to maintain racially separate public schools and other facilities," nor agreed to such a prohibition when ratifying the Fourteenth Amendment, and that the United States Supreme Court's decisions were "null, void and of no force or effect." No legislation implementing the subject matter of said resolution was passed.

109. In 1955, the Georgia General Assembly enacted legislation which, *inter alia*, prohibited the use of state or local funds for integrated public schools in the State and made it a felony to violate such prohibitions. These provisions are no longer in force in Georgia.

110. In 1955, the Georgia General Assembly passed two resolutions calling upon the United States Congress to convene a Constitutional Convention to amend the Constitution: (1) to vest exclusive authority to regulate, administer and operate public schools in the States; and (2) to eliminate federal court jurisdiction in any case drawing into question the administration of state public school systems. The United States Congress took no such action.

111. In 1956, the Georgia General Assembly adopted a resolution urging the Congressional delegation from Georgia to oppose HR 7535, a federal education bill which called for the denial of federal funds to states that continued to segregate their public schools, for the stated reasons that the bill would result in increased taxation and that it constituted an unacceptable federal encroachment on state sovereignty. The bill nonetheless passed.

112. In 1956, the Georgia General Assembly passed a bill enabling the Governor to close public schools under certain prescribed circumstances, and, among other things, to provide students in any such closed school districts with state and local public grants to be used for educational purposes. Those provisions are no longer in force in Georgia.

113. In 1956, the Georgia General Assembly provided for the cut-off of further state funds upon admission of blacks to a state university. Those provisions are no longer in force in Georgia.

114. In 1957, the Georgia General Assembly adopted legislation providing the Governor with the authority to suspend the operation of the state compulsory school attendance law when necessary because of any riot, insurrection, public disorder, disturbance of the peace, natural calamity or disaster, in order to protect persons and property or to preserve the health and welfare of the citizens, or to preserve the general welfare of the state. These provisions are no longer in force in Georgia.

115. In 1957, the Georgia General Assembly passed a resolution which expressed the view that the Congress which had proposed the 14th and 15th Amendments was improperly constituted, that the amendments were not promulgated in the manner specified by the Constitution, that ratification of those amendments had been militarily coerced, and urged the United States Congress to declare the Fourteenth and Fifteenth Amendments of the United States Constitution "null and void and of no effect." The United States Congress took no such action.

116. In 1957, when the Judiciary Committee of the United States House of Representatives was considering civil rights legislation, the Georgia General Assembly passed a resolution requesting the United States House of Representatives to permit "appropriate public officials and citizens to appear before the [Judiciary] committee . . ." In support of its request, the General Assembly stated, among other things, that "the [Judiciary] committee should not take speedy action on legislation of this type, particularly in view of the fact that there are serious legal and constitutional objections thereto."

117. In 1958, after President Eisenhower called out military forces in Little Rock, Arkansas to enforce

school desegregation orders issued by the courts, the Georgia General Assembly passed a resolution detailing the view that the president had thereby exceeded his powers, and that his actions were unlawful and unconstitutional for various reasons expressed in the resolution. The resolution censured President Eisenhower for those actions, and charged among other things that "the president sacrificed the honesty and integrity of our highest executive office on the alter of political expediency to appease the NAACP and other radical, communist sympathizing organizations."

118. In 1959, the Georgia General Assembly passed a resolution requesting that the Georgia Department of Education prepare an outline of the grades and courses taught in public schools in order "to offer a teaching guide around which to build private schools in Georgia." The General Assembly declared that this effort was "for the use of existing public and private schools, and for the information of any and all other citizens of Georgia," and stated that "such information will be of the utmost value in the assisting and solving of the most pressing and grave problem ever to be presented to public education in this State. . ."

119. In 1959, the Georgia General Assembly authorized the Governor to close any public school if the Governor determined that continued operation was likely to result in or cause violence or public disorder, or that it was necessary to close the school in order to preserve order, peace and dignity of the state, and established criminal sanctions for failure to comply with such an executive order. These provisions are no longer in force in Georgia.

120. In 1959, the Georgia General Assembly authorized the Governor to close any branch or department

under the control of the Board of Regents of the University System of Georgia if the Governor determined that continued operation was likely to result in or cause violence or public disorder, or that it was necessary to close the school in order to preserve order, peace and dignity of the state. These provisions are no longer in force in Georgia.

121. The University of Georgia refused to admit black students until that practice was declared unlawful and enjoined by a federal court in 1961. *Holmes v. Danner*, 191 F. Supp. 394 (M.D.Ga. 1961); *Ward v. Regents of University System of Georgia*, 191 F. Supp. 491 (N.D.Ga. 1957).

122. The first black student is believed to have matriculated to the University of Georgia Law School in 1963; he graduated in 1966.

123. From 1968 through 1973 school years, no first year class of the University of Georgia law school had as many as ten black students. Fourteen black students were enrolled at the University of Georgia law school in 1973.

124. In 1959, the Georgia General Assembly passed a resolution urging the United States Congress to call a constitutional convention to amend the United States Constitution to vest exclusive power over the operation of public schools to the states and its subdivisions. The United States Congress took no such action.

125. In 1960 the Georgia General Assembly enacted a law which by its terms prohibited municipal corporations in Georgia from levying taxes to support and maintain integrated public schools. These provisions are no longer in force in Georgia.

126. In 1961, the Georgia General Assembly enacted

legislation that established public grants to enable students to attend private schools of their choice in lieu of public schools. One of the stated purposes of the legislation was "to further secure the constitutional rights of school children to attend private schools of their choice in lieu of public schools." These provisions are no longer in force in Georgia.

127. In 1961, the Georgia General Assembly proposed a state constitutional amendment declaring that "[f]reedom from compulsory association at all levels of public education shall be preserved inviolate," and providing for taxation to provide adequate education for the citizens of Georgia.

128. In 1965, the Georgia General Assembly passed a resolution requesting Congress to call a constitutional convention to amend the United States Constitution, proposing an amendment reading: "Among the rights reserved to the states shall be the right to sole, and exclusive jurisdiction of public school systems in the separate states . . ." The United States Congress took no such action.

129. In 1971, the House of the Georgia General Assembly passed a resolution urging the Georgia Congressional delegation to enact federal legislation eliminating busing as a measure to achieve "an arbitrary racial balance of pupil population," for the stated reason that busing is disruptive of the educational process, consumes a significant portion of the transported student's time which could be more productively used in pursuit of educational and recreational activities, and diverts school system assets from educational processes. The United States Congress took no such action.

OTHER GEORGIA RACIAL HISTORY

130. In 1955, the Georgia General Assembly adopted a resolution calling upon the Congress to convene a constitutional convention to amend the United States Constitution to permit members of the armed services to serve in racially segregated units. No action was ever taken by the Congress on the resolution.

131. In 1956, the Georgia General Assembly enacted a law authorizing the General State Patrol and Georgia Bureau of Investigation to enter in any county or municipality upon the request of any citizen or official thereof, to enforce Georgia's segregation laws. These provisions are no longer in force in Georgia.

132. In 1956, the General Assembly authorized state and local governments to dispose of any property comprising parks, swimming pools, or other property "dedicated to public use or recreation or park purposes," enacted a law requiring common carriers to provide separate station rooms labelled "White Waiting Room, Intrastate Passengers" and "Waiting Room, Interstate Passengers and Colored Intrastate Passengers," and adopted an Act making it a misdemeanor for an intrastate traveler to occupy a waiting area not designated for such traveler's race. These provisions are no longer in force in Georgia.

133. In 1956, the Georgia State Law Department published a "Compilation of Georgia Laws and Opinions of the Attorney General relating to Segretation of the Races." In his introduction to this publication, the Georgia Attorney General stated, "A perusal of the many segregation laws included herein, affecting as they do almost every phase of human endeavor to which the authority of government traditionally extends, convincingly demonstrates the predominant influence that

racial segregation has exerted in the sociological development of the two races in this State." Georgia State Law Department, *Compilation of Georgia Laws and Opinions of the Attorney General relating to Secregation of the Races*, pp. 2, 3 (April 1956). An authentic copy of this compilation of segregation laws is Exhibit U.S. 55.

134. Prior to 1968, the State of Georgia maintained racially segregated penal institutions. These segregated penal institutions were declared unlawful in *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga. 1968), *aff'd* 393 U.S. 266 (1968)

GEORGIA SOCIOECONOMIC DEMOGRAPHICS

135. In Georgia, white households have a per capita income of $15,832, black households have a per capita income of $7,997, or 50.5 percent of the per capita income of whites. 1990 Census, Table 17, Selected Characteristics of Persons by Race and Hispanic Origin, at p. 49. Abrams Exhibit 1.

136. In Georgia, white households have a mean income of $41,043, black households have a mean income of $23,752, or 57.9 percent of the mean income of whites. 1990 Census, Table 17, at p. 49. Abrams Exhibit 1.

137. In Georgia, of 1,757,768 white households, 90,861 (5.2%) have per capita income less than $5,000; of 573,290 black households, 94,391 (16.5%) have per capita income less than $5,000. 1990 Census, Table 17, at p. 49. Abrams Exhibit 1.

138. In Georgia, of 1,757,768 white households, 84,453 (4.8%) have per capita income of $100,000 or more; of 573,290 black households, 4,228 (0.7%) have per capita income of $100,000 or more. 1990 Census, Table 17, at p. 49. Abrams Exhibit 1.

139. In Georgia, of 2,997,958 white persons 25 years and over, 74.9 percent háve high school diplomas or higher education, and 21.8 percent have bachelor's degree or higher education; of 954,209 black persons 25 years and over, 58.6 percent have high school diplomas or higher education and 11.0 have bachelor's or higher education. 1990 Census, Table 17, at p. 49. Abrams Exhibit 1.

140. In Georgia, of 2,479,480 white persons 16 years and over in the labor force, 98,944 (4.0%) are unemployed; of 802,174 black persons 16 years and over in the labor force, 85,049 (10.6%) are unemployed. 1990 Census, Table 17, at p. 49. Abrams Exhibit 1.

141. In Georgia, of 1,279,452 white families, 79,248 (6.2%) have income below poverty level; of 418,583 black families, 114,519 (27.4%) have income below poverty level. 1990 Census, Table 17, at p. 50. Abrams Exhibit 1.

142. In Georgia, of 4,496,697 white persons, 394,561 (8.8%) have income below poverty level; of 1,678,436 black persons, 507,992 (30.3%) have income below poverty level. 1990 Census, Table 17, at p. 50. Abrams Exhibit 1.

143. In Georgia, of 313,042 white children under age five, 34,251 (10.9%) have income below poverty level; of 162,216 black children under age five, 70,953 (43.7%) have income below poverty level. 1990 Census, Table 17, at p. 50. Abrams Exhibit 1.

144. In Georgia, of 183,179 white persons 75 and over, 38,947 (21.3%) have income below poverty level; of 51,383 black persons 75 and over, 23,605 (45.9%) have income below poverty level. 1990 Census, Table 17, at p. 50. Abrams Exhibit 1.

145. In Georgia, of 1,279,452 white families, 139,156

(10.9%) are female-headed households with no husband present; of 418,583 black families, 180,908 (43.2%) are female-headed households with no husband present. 1990 Census, Table 17, at p. 50. Abrams Exhibit 1.

1970s REDISTRICTING

156. On November 4, 1971, Georgia submitted a congressional redistricting plan to the Attorney General for review pursuant to Section 5 of the Voting Rights Act. The plan had been enacted into law in October 1971. See Exhibit U.S. 1.

157. According to the state's November 4, 1971 submission of this redistricting plan was to comply with the one person, one vote principle. "The act was adopted in order to ensure that the apportionment of the Georgia Congressional Districts corresponds to the one man-one vote standard enunciated by the United States Supreme Court." 1971 submission, at 1.

158. The 1971 redistricting was required by an unreported three-judge court opinion and order in *Cahoon* v. *Maddox*, C.A. No. 13011 (N.D. Ga., January 12, 1970).

159. Changes in the distribution of the state's population between 1960 and 1970 made it necessary to change the boundaries between the various congressional districts. According to the state's November 4, 1971, submission, "The difference between the old and new law is that the new apportionment act establishes districts which are very nearly equal in population." 1971 Submission, at 1.

160. According to data compiled by the U.S. Bureau of the Census, the nonwhite population of Fulton County, Georgia, increased from 34.8 percent of the county's total population in 1960 to 39.3 percent in 1970.

161. According to data compiled by the U.S. Bureau of the Census, the nonwhite population of the city of Atlanta (located primarily in Fulton County but with a small portion in DeKalb County) increased from 38.3 percent in 1960 to 51.6 percent in 1970.

162. On the basis of the one-person, one-vote standard, the ideal congressional district population after 1970 was 458,958. That part of the city of Atlanta located in Fulton County had a population of 450,286 in 1970, only 8,672 persons less than the size of an ideal congressional district.

163. In its November 4, 1971, submission the State of Georgia stated that it used racially neutral redistricting principles in creating its congressional redistricting plan. Attorney General Arthur K. Bolton stated in the submission that racial composition data "were not used by the General Assembly to calculate the new districts." The state did not include such data with its Section 5 submission, noting that "population information by race may be obtained from the Bureau of the Census." 1971 Submission, pp. 2, 5.

164. The state's 1971 submission stated: "The General Assembly contracted with the computer center at the University of Georgia to assist in establishing equal districts. The contract specifically prohibited the Center from programming racial data." 1971 Submission, at 3.

165. The state's 1971 submission included, as documentation of the contract referenced in the preceding paragraph, a newspaper article about the contract: Prentice Palmer, "COMPUTER IN REMAP TO SKIP VOTE RECORD: RACE MAKEUP ALSO RULED OUT AS HOUSE HIRES ATHENS TEAM," *Atlanta Journal*, April 8, 1971, at 1A, 6A. An authentic copy of the newspaper article referenced by the state is Exhibit U.S. 2.

166. According to the state's 1971 submission, one reason why the state prohibited the computer center from entering racial data was that "it was believed that the use of such data might itself be constitutionally impermissible." 1971 Submission, at 3.

167. According to the state's 1971 submission, "the basic plan was to maintain the integrity of the counties, where possible. Where it was necessary to divide a county, the breakdown was according to census county division, census tract, enumerated district, or in a few instances, census blocks." 1971 Submission, p. 3.

168. The existing congressional redistricting plan, in effect since 1964, split Fulton County between the fourth and fifth congressional districts by assigning a strip along the eastern border of Fulton County to the fourth district. An authentic copy of the map of this plan, as included in the state's November 4, 1971 submission is Exhibit U.S. 3.

169. The congressional redistricting plan adopted by the state in 1971, restored most of the aforesaid portion of eastern Fulton County to the Fifth Congressional District and assigned in portions of southern Fulton County to the Fourth and the Sixth Congressional Districts. An authentic copy of the map of this plan, as included in the state's November 4, 1971 submission is Exhibit U.S. 4.

170. The 1971 congressional redistricting plan split Fulton County into the Fourth, Fifth and Sixth Districts. One county was split between the Seventh, and Ninth Congressional Districts.

171. The congressional redistricting plan adopted by the state in October 1971 assigned portions of southwestern Atlanta to the Sixth Congressional District.

See Exhibit U.S. 5.

172. According to the aforesaid comment of the Fulton County Democratic party, both Atlanta Vice-Mayor Maynard Jackson, who is black, and Andrew Young, a black candidate for the fifth district seat in 1970 against incumbent Republican Fletcher Thompson, resided in the area of southwestern Atlanta moved from the Fifth to the Sixth congressional district in the plan adopted by the state in 1971. Exhibit U.S. 5.

173. In those portions of the city of Atlanta moved from the Fifth to the Sixth Congressional District, 8,907 (52.6 percent) of the registered voters were black. In those areas of Fulton County outside the city limits of Atlanta that remained in the Fifth Congressional District, 56,588 (98.9 percent) of the registered voters were white. Exhibit U.S. 5.

174. According to Exhibit U.S. 5, Fulton County Democratic Party incumbent Congressman Fletcher Thompson and state Senator Frank Coggins, one of the co-authors of the congressional redistricting plan adopted by the state in October 1971, resided in that area of Fulton County south of Atlanta that remained in the Fifth Congressional District.

175. Senator Leroy Johnson, the first black person elected to the Georgia General Assembly in the twentieth century, developed a partial congressional redistricting plan in which the Fifth Congressional District would be composed primarily of the city of Atlanta, with some predominantly white areas of northern Fulton County shifted into the fourth district. The vote in the Senate on the Johnson plan on September 30, 1971, was nine in favor, with 43 opposed. Exhibit U.S. 6.

176. Representative Benjamin D. Brown introduced a

partial congressional redistricting plan in the Georgia House on October 4, 1971. Using 1970 census data, the nonwhite population of the Fifth District was 49.2 percent in the Brown plan. The Brown plan placed predominantly white northern portions of Fulton County in the Fourth Congressional District. Exhibit U.S. 6.

177. The congressional redistricting plans submitted by Senator Johnson and Representative Brown, as referenced in the preceding paragraphs, were defeated by substantial margins. However, all 13 black representatives in the House voted for the Brown plan, and both black senators voted for the Johnson plan. 1971 Senate Journal, at 118; 1971 House Journal, at 3611-3612.

178. In the House Committee on Legislative and Congressional Reapportionment, Representative Grace Hamilton, the only black member of the committee, introduced a congressional redistricting plan, which was not approved by the committee. Exhibit U.S. 6.

179. On February 11, 1972, the Attorney General of the United States interposed a timely objection to the congressional redistricting plan submitted on November 4, 1971, on the grounds that the state had not met its burden of proof regarding the boundaries between the Fifth and Sixth Congressional Districts. "With respect to those [districts], after careful review of all the information available to us we have been unable to conclude, as we must under the Voting Rights Act, that these new boundaries will not have a discriminatory racial effect on voting by minimizing or diluting black voting strength in the Atlanta area." Exhibit U.S. 7.

180. In 1982, a federal court concluded that the congressional redistricting plan adopted by the state of Georgia in 1971 was drawn to fragment black voting strength in the Atlanta area and to place the residences

of black persons clearly recognized as potential candidates for election to Congress from the Fifth District just across the border in the Sixth Congressional District. *Busbee* v. *Smith*, 549 F. Supp. 494, 500 (D.D.C. 1982).

181. The United States Attorney General precleared a revised congressional redistricting plan for the State of Georgia on April 11, 1972. Exhibit U.S. 8.

241. In 1972, Andrew Young became the first black person since the Reconstruction period to be elected to the United States Congress from the State of Georgia. From 1972 until 1992, no more than one black person at a time was a member of Georgia's congressional delegation.

I. DECLARATIONS OF SELWYN CARTER
[Abrams' Exh. 35]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Civil Action No.

CV 194-008

DAVIDA JOHNSON, ET AL. *Plaintiffs*,

v.

ZELL MILLER, ET AL., *Defendants*,

and

LUCIOUS ABRAMS, JR., ET AL,

Defendant-Intervenors,

UNITED STATES OF AMERICA,

Defendant-Intervenor.

DECLARATION OF SELWYN CARTER

Pursuant to 28 U.S.C. §1746, I declare that:

1. My name is Selwyn Carter. I am the Director of the Voting Rights Program of the Southern Regional Council, Atlanta, Georgia. The Council is a non-profit human rights organization.

2. I am a graduate of City College of New York, where I majored in economics. I have completed the course work for a masters degree in political management at the Graduate School of Political Management at George Washington University.

3. The Voting Rights Program of the Southern Regional Council provides various services to community groups and sub-units of government, primarily in the South. These services include preparing proposed redistricting plans for local and state legislative bodies and for the Congress. I have prepared numerous redistricting plans using redistricting computer software and have given declarations similar to this in other court cases.

4. During July, 1995 I was contacted by Laughlin McDonald, one of the attorneys for the Abrams intervenors. He asked me to prepare one or more congressional redistricting plans for the state of Georgia. He advised me that the Supreme Court invalidated the existing Eleventh District on June 29, 1995 in *Miller v. Johnson*, and that the Court concluded that race had been the predominant factor in the 1992 redistricting process and that the state had subordinated all its traditional redistricting principles to race.

5. In preparing my plans, Mr. McDonald instructed me to rely to the greatest extent possible upon the state's traditional non-racial redistricting principles, which I attempted to do. In this connection, he provided me with a copy of the redistricting guidelines adopted by the state during the 1991-1992 redistricting process. A copy of these guidelines is attached to this declaration.

6. Mr. McDonald also instructed me that while race could be considered as one of many factors in redistricting, race could not be the predominant factor in the construction of any redistricting plans nor could the state's traditional redistricting principles be subordinated to race.

7. In preparing the redistricting plans my staff and I applied the following criteria:

a. Complying with one person-one vote as nearly as is practicable.

b. Using only single-member districts.

c. Insuring that districts are composed of contiguous geography.

d. Maintaining the integrity of political subdivisions as much as possible.

e. Maintaining the cores of existing districts.

f. Protecting and avoiding contests between incumbents.

g. Using local voting precinct boundary lines as the basic district building blocks, or where that is not practicable census block group geography.

8. Mr. McDonald further advised me that the plans he wanted me to draw were intended to be remedial and to be proposed remedies for the violation found by the Supreme Court, which he said involved the construction of the Eleventh District. He asked me to focus on the Eleventh District and not to change other districts any more than was necessary in redrawing the Eleventh and in complying with the state's traditional redistricting principles.

9. Mr. McDonald also advised me that the plans he wanted me to draw might be filed with the court as proposed court ordered remedies, and that as a consequence I should try to keep the population deviations as low as possible.

10. Applying the instructions and guidelines described above, my staff and I prepared three redistricting plans. The first is dated August 8, 1995 and is marked SRC/ACLU Plan A. A copy of Plan A is attached. This plan was actually introduced before the house and sen-

ate reapportionment committees on behalf of the black legislative caucus but was not adopted. Under Plan A, the Eleventh District consists of the following whole counties: Burke, Jefferson, Washington, Hancock, Taliaferro, Greene, Putnam, Jasper, Newton, and Rockdale. Portions of Richmond, Warren, DeKalb and Fulton Counties are also included in the Eleventh District. Under the pre-existing 1992 plan invalidated by the Supreme Court nine counties were split. The total deviation among districts under Plan A is 0.21%.

11. In constructing Plan A, I avoided using so-called land bridges and did not include any portions of Savannah. I also attempted to make the Eleventh District as regular as possible while at the same time applying the guidelines described above. Race was not the predominant factor in the construction of Plan A, nor were the state's traditional redistricting principles subordinated to race. That is apparent from: (1) the regular shape and compactness of the Eleventh District; (2) the number of whole counties in the district; (3) the fact that the black voting age population in the district was reduced from 60.4% to 53.05%; (4) the fact that the deviation is only 0.29%; (5) the fact that the district follows the core of the old Tenth District under the 1982 plan; and, (6) insofar as I am aware no two incumbents are placed in the same district.

12. My staff and I drew a second redistricting plan dated August 9, 1995 which is marked SRC/ACLU Plan B. A copy of Plan B is attached. The Eleventh District under Plan B has the same configuration as under Plan A. The difference between the two plans is that fewer counties are split in Plan B. I drew Plan B simply to show that a plan could be drawn, in conformity with the state's traditional redistricting principles, that minimized the number of split counties. However, because

fewer counties are split under Plan B it has a deviation of 0.51%, which is higher than the deviation in Plan A.

13. My staff and I drew a third redistricting plan which is marked Plan C, a copy of which is attached. Plan C was generated using the state's, rather than the Southern Regional Council's, computer. The significant differences in Plan C and the other two plans are that no portions of Richmond County are included in the Eleventh District, and only two counties are split, Fulton and DeKalb. Overall, only seven counties are split in Plan C, Muscogee, Fulton, DeKalb, Clayton, Cobb, Gwinnett, and Bibb, all of which are in heavily populated urban areas of the state. However, because few counties were split, the total deviation among districts is 0.99%, the greatest deviation among the three plans.

I declare under penalty of perjury that the above and foregoing is true and correct. Executed at Atlanta, Georgia this 31st day of August, 1995.

SELWYN CARTER

8/31/95

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Civil Action No.

CV 194-008

DAVIDA JOHNSON, ET AL. *Plaintiffs,*

v.

ZELL MILLER, ET AL., *Defendants,*

and

LUCIOUS ABRAMS, JR., ET AL,

Defendant-Intervenors,

UNITED STATES OF AMERICA

Defendant-Intervenor.

SUPPLEMENTAL DECLARATION OF SELWYN CARTER

Pursuant to 28 U.S.C. §1746, I declare that:

1. My name is Selwyn Carter. The purpose of this supplemental declaration is to correct an error in my prior declaration.

2. The data for Plan A, which was dated August 8, 1995, included in my prior declaration was for a revision of Plan A and was mistakenly attached to the declaration. The correct demographic data and map for Plan A is attached and is dated July 31, 1995. The differences between the July 31, 1995 plan and the August 8, 1995

revision are minor, the principle one being that the July 31, 1995 plan has a total deviation of .29% and the August 8, 1995 plan has a total deviation of .45%. The configuration of the Eleventh District is the same under both plans.

I declare under penalty of perjury that the above and foregoing is true and correct. Executed at Atlanta, Georgia this day of October, 1995.

SELWIN CARTER

10/10/95

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Civil Action No.

CV 194-008

DAVIDA JOHNSON, ET AL. *Plaintiffs*,

v.

ZELL MILLER, ET AL., *Defendants*,

and

LUCIOUS ABRAMS, JR., ET AL,

Defendant-Intervenors,

UNITED STATES OF AMERICA,

Defendant Intervenor.

SECOND SUPPLEMENTAL DECLARATION OF SELWYN CARTER

Pursuant to 28 U.S.C. §1746, I declare that:

1. My name is Selwyn Carter.

2. I was asked by Laughlin McDonald, one of the attorneys for the Abrams intervenors, to prepare a congressional redistricting plan that complied with the Order of the Court dated October 17, 1995, *i.e.*, that "makes the least changes, in terms of line drawing, in Georgia's present congressional plan but at the same time brings the Eleventh District into compliance with the United States Constitution." I was also asked by Mr.

McDonald to draw a plan applying the same standards set out above that assumed that the Second District is now unconstitutional.

3. In addition, Mr. McDonald requested me to draw a plan that complied with the subsequent Order of the Court dated October 20, 1995, *i.e.*, that was "based on the first plan that Georgia submitted to the Department of Justice for preclearance."

4. Pursuant to these instruction a plan was prepared under my supervision, a copy of which is attached and designated ACLU1A. This plan assumes that the Second District is also unconstitutional.

5. In drawing ACLU1A, I attempted to make the least changes possible in the existing plan but at the same time address the problem areas identified in the opinions of this Court and the Supreme Court.

6. The Ninth District is totally unchanged in ACLU1A from the existing plan.

7. There are only minimal changes in the Fourth, Fifth, Sixth, Seventh, and Tenth Districts compared to the existing plan. In general the changes that were made were necessary to comply with one person, one vote, and because of changes made in other districts, primarily in the Second and Eleventh Districts.

8. More specifically, in the Tenth District the changes were limited to precinct lines in Richmond and Gwinnett Counties. The changes in Richmond County were made to respond to the finding of the Court that the configuration of the existing plan was designed only to include or link black neighborhoods in the Eleventh District. Under ACLU1A, the Eleventh District is not designed simply to link black neighborhoods, but includes a substantial white population. In addition, the split was

made to comply with the wishes of the Richmond County Commission that the county be split to maximize the representation of the county in Congress. Race was therefore not the predominant reason for splitting Richmond County in ACLU1A, nor is the split simply along racial lines. The Eleventh District includes 115,759 persons from Richmond County of whom 50.19% are black and are of voting age.

9. The changes in the Tenth District in Gwinnett were made to comply with the one person, one vote standard, to compensate for the previously described changes in the Tenth in Richmond County, and to maintain a minimum of county splits.

10. In the Sixth District, precinct changes were limited to Cobb and Gwinnett Counties. The changes in the Sixth in Gwinnett were the result of the changes in Gwinnett in the Tenth described above. The changes in Cobb County were limited to two precincts and were caused by the changes in Gwinnett and because of the need to comply with one person, one vote.

11. In the Seventh District, the changes were the result of the two precinct changes in Cobb County in the Sixth described above. Secondly, Meriwether County was included in the Seventh because the Courts criticized its inclusion into the Second. Further, its inclusion into the Seventh was to comply with one person, one vote.

11. The changes to the Eighth District resulted from bringing the Second and the Eleventh Districts into compliance with the Courts' standards as described above. The removal of Meriwether County from the Second District and population changes resulting from the elimination of splits in the counties of Lowndes, Colquitt, Dougherty, Lee, Crisp, Dooly, Houston,

Bleckley, Twiggs and Crawford necessitated changes to the Eight and Third Districts to bring them into compliance with one person, one vote. While there are many ways to insure compliance with one person, one vote, these particular changes were made to achieve minimum disruption to the existing plan.

12. The changes to the First Congressional District resulted from the removal of the Chatham/Effingham area from the Eleventh District.

13. No counties were split in the First or the Eight Districts.

14. While ACLU1A is based specifically on the existing plan rather than the first plan enacted by the state and submitted to the Department of Justice, ACLU1A fairly incorporates significant features of the first plan. The overriding concern in the construction of ACLU1A was to correct the defects identified by the Courts in the existing plan.

I declare under penalty of perjury that the above and foregoing is true and correct. Executed at Atlanta, Georgia this day of October, 1995.

SELWYN CARTER

October 25, 1995

J. TESTIMONY OF LINDA MEGGERS

[Excerpts from Hearing Testimony, 10/30/95-10/31/95: Tr. p. 20, line 1-p. 21, line 14; p. 26, lines 2-20; p. 31, line 17-p. 32, line 8]

MR. PARKS: Your Honors, we are going to offer Ms. Meggers as a political analyst and expert in redistricting. As to her qualifications I would point out that both this court and the Supreme Court have recognized her as a most knowledgable person in this area.

I intend to ask her both factual questions and questions that will require her to give her opinion. I would like to have her qualified as an expert.

JUDGE BOWEN: Considering the findings of this court and the Supreme Court it would be difficult to deny Ms. Meggers the right to state her opinions. And I'm confident, Ms. Meggers, if you are ask[ed] to state any opinion you do not feel comfortable with you will let is know.

You may elicit her opinion from time to time as is necessary within the sphere of her expertise.

MR. PARKS: Thank you, your Honor.

Q. Ms. Meggers, were you involved in the drawing of the Second Congressional District?

A. Yes.

Q. When, in relationship to the drawing of the Eleventh Congressional District, was the idea or decision made to try to draw a majority black district southwest Georgia[;] did that come before or after [the] Eleventh District?

A. It came after.

Q. In what context?

A. I think at the outset of 1991 there was a purposeful effort on behalf of the General Assembly to draw a second minority majority district. The creation of a the Second as a minority majority district is clearly reflected in the second plan produced by the General Assembly.

To answer your question creation of the Second Congressional District as a minority majority district came later.

* * * * *

Q. Was the portion of Bibb County that was placed in the Eleventh District primarily, in the first plan, the predominantly black population concentrations of Macon and Bibb County?

A. Yes, they were the major black precincts.

Q. The Eleventh District ending here is what we are seeing her[e] the result of what is known as the Macon Savannah trade?

A. Yes, on the third try at drawing the Congressional plan Bibb County was removed from the Eleventh District and that portion of the black population previously in the Eleventh was attached to Second District.

Q. For what reason?

A. That was the one way in which we could achieve a majority black VAP in the Second Congressional District.

Q. So it was racially motivated?

A. Yes.

* * * * *

Q. First taking Muscogee County where has Muscogee County been located, traditionally?

A. In the Third Congressional District.

Q. Why was that?

A. The Third Congressional District, up until 1991, was what we had dubbed, basically, the military district. It included Houston with Warner Robins and Muscogee with Fort Benning.

Q. Where is Fort Benning located?

A. Fort Benning starts, on this one here, it starts here and takes in a big part of Chattahoochee County. It comes down like this and the bulk of Chattahoochee County is below it.

Q. So it takes in the northern portion [of] Chattahoochee County and the southern portion of Muscogee?

A. Yes.

K. TESTIMONY OF SANFORD BISHOP

[Excerpt from Hearing Testimony, 10/30/95-10/31/95 Tr. p. 114, line 17-p. 116, line 7]

During the reapportionment process whenever the question of splitting counties or cities was raised people in the those areas would be on opposite sides. Some will say we don't want our county or city split. So I felt as we went into the special session it would be a good idea to get an indication from the people in those cities or counties as to how they felt about it. In talking with members of city councils and mayors and the administrators for housing authorities and school board members from across the Second District many of them said we like things just the way they are. The only information I could give them was to write your legislator and let him know how you feel because that's going to be an issue. If you are comfortable with this the way it is let someone know. The mayors and councils of Macon, Columbus, Albany and Valdosta have passed resolutions saying they were comfortable with the split. In light of the redistricting process that was pending they did not want making their counties whole to be a consideration. They like having two members of Congress to have their needs addressed. They felt in the long run it was serving their best interests contrary to what they initially felt.

Therefore, they were comfortable in passing a resolution in Macon, Columbus and Albany and those resolutions were passed unanimously. In Valdosta it was by a majority. It was a feeling, even in the business areas, in Columbus, for example, where there had been a great deal of consternation about splitting Muscogee County. After the combined sewer overflows funds were obtained as a result of the freshmen Congressmen work-

ing together to get $20 million for the project that everybody thought was going to be impossible. Working together one Democrat and one Republican were able to get that money. When the Republicans on the Senate side were going to take that money out the Republican member from the Third district was able to keep that money and we were able to secure that project for Columbus.

L. ARGUMENT: LAUGHLIN McDONALD

[Excerpts from Hearing Testimony, 10/30/95-10/31/95 Tr. p. 277, lines 10-22; p. 279, line 15 to p. 280, line 7; p. 282, lines 2-12; p. 283, lines 11-15; p. 283, line 21-p. 284, line 10]

Now, the State argues that it was compelled by the Department of Justice to draw a plan containing two and then three minority majority districts, but the record does not reflect that. Prior to any involvement by the Department of Justice. Prior to the submission of any plan by [*sic*] to the Attorney General the leadership made the decision, based on the fact that the State was gaining a congressional district, that they would draw a second majority black district and that's what they did in the first plan they drew draw [*sic*]. So it was the State's announced policy of having two majority black districts.

* * *

I want to talk for a moment about the retrogression standard and what serves as a basis for determining that. I submit that the 1982 plan cannot serve as the bench mark for retrogression for two reason[s]. First of all that plan is and was an unconstitutional plan. It was in violation of the one person one vote. The Second [*sic*] major problem is that it contains a different number of seats from any existing plan. It was a ten seat plan and we are now dealing with an eleven seat plan[;] it is like comparing apples and oranges. Even if we assume, despite the fact that it is unconstitutional, despite the fact that it contains a different number of seats[,] that [the] 1982 plan should be the bench mark[,] I think any plan that contains less than two minority majority districts is retrogressive for the simple reason that one out of 11 is retrogressive when compared to one out of ten.

* * * * *

The Court said, in an opinion that has been criticized by some, that there are no diminimous [*sic*] deviations in a congressional redistricting plan and invalidated the New Jersey plan because the court said you could have drawn one with a .4 percent deviation. There is no diminimous [*sic*] deviation and a jurisdiction is obligated to make a good faith effort to comply exactly with population equality concepts. Of course, if a legislature has to do that I think it is even more incumbent on [a] District Court to do that when drawing a plan.

* * * * *

Now, in our plan our deviation is .93. So I did want to alert the Court that in our view that is something that the Court needs to be concerned about, but it may be removed by Carsher [*sic*] as long as you have an articulable basis for it.

* * * * *

In our plan we tried to split as few as possible because we wanted to respond to the criticism, but it is clear that you could split some counties here and cure those deviations. It might well be that principle of maintaining the integrity of those counties articulated, expressed and justified in the record would excuse the deviations of that .9 percent. I suppose we are suggesting that it would because we are presenting this plan as one we think would be acceptable. I think some of ones that go up to 1.9 nine that's just inviting a problem, it seems to me, for the court. Aside from the retrogression plan I think that's a serious legal issue if the Court were to draw a plan that contains less than two minority districts.

M. TESTIMONY OF SELWYN CARTER

[Excerpt from Hearing Testimony, 10/30/95-10/31/95 Tr. p. 294, line 17-p. 295, line 3; p. 295, line 14-p. 296, line 12; p. 297, line 12-p. 309, line 17; p. 310, line 14-p. 313, line 3; p. 313, line 19-p. 323, line 21; p. 324-lines 1-25; p. 325, line 9-p. 326, line 15; p. 330, lines 4-12; p. 330, line 19-p. 331, line 6; p. 332, lines 6-14; p. 333, lines 3-6; p. 338, lines 10-20; p. 339, line 3-p. 340, line 19.]

Q. Would you outline your duties with the Southern Regional Council?

A. Certainly. First of all the council is the oldest inter-racial organization in the southeast. We view ourselves as promoting democratic practices in government. My work is to oversee the council's work in the area of promoting fairness in redistricting across the south. We assist state legislatures, attorney generals and community leaders in drafting districting plans and in assessing plans drafted by others for fairness and compliance with the Voting Rights Act.

* * * * *

MR. McDONALD: Your honor, we would like to have Mr. Carter qualified as an expert in the field of demography and redistricting.

JUDGE BOWEN: You may elicit his opinions.

Q. Were you asked to draw or produce any congressional districting plans by the Abrams Intervenors?

A. Yes, I was.

Q. What did you do?

A. I developed a number of plans some of which were presented to the Legislature or rather before the

Reapportionment Committee of the Legislature. A number of them which were presented with affidavits here to this Court.

My basic goal in preparing those plans was to try to show it is possible to develop a constitutional redistricting plan which is fair to both black and whites voters in the State of Georgia and comply with this Court's ruling in Miller v Johnson. To show that it is possible to draw a plan in which African American voters comprise approximately 50 percent of the voting age population of a district and at the same time show that race was not a factor.

* * * * *

MR. McDONALD: Then, your Honor, we have a map which I think it would make sense to introduce as a separate exhibit which is the ACLU1A Plan.

JUDGE BOWEN: Do you want to call that 36?

MR. McDONALD: Yes, sir.

JUDGE BOWEN: All right. 36 is admitted. (Abrams Intervenors Exhibit 36 was received in evidence.)

Q. Mr. Carter, I principally want to ask you about what has been marked Abrams Intervenors Exhibit 36. Did you either construct or supervise the drawing of this plan ACLU1A?

A. The first three plans you mentioned I did draw my myself. This particular plan was drawn under my supervision.

Q. Was it drawn on the state computer?

A. That's correct.

Q. What did you do in generating this plan?

A. The overriding methodology in developing this plan was to correct the constitutional defects in the Eleventh Congressional District and assume that the Second Congressional District was unconstitutional and correct to [*sic*] assumed defect in that district and to maintain the remaining districts with as little change as possible.

Q. What changes did you make to the Eleventh Congressional District compared to the existing plan? The existing plan is below the plan that you prepared, can you see that?

A. Yes, I can.

There were a number of changes. The principal changes were the extensions of the district through Effingham County and Chatham county were removed because they were identified by this Court and the Supreme Court at [*sic*] being clear examples of racial gerrymandering of the district.

In addition the way in which this district goes into Richmond County through what's been called the back door was corrected. That was corrected by bringing in a considerable number of white voters previously in the Tenth District and transferring them to the Eleventh District.

Q. Richmond County is split in your plan?

A. Yes, sir, it is split.

Q. Is that split made along racial lines?

A. No, it's not. In fact, Richmond County contains 115,000 voters in the Eleventh district[.] Approximately 50 percent African America[n]s of voting age and 47 percent white voters. It is difficult to give the exact number for the black and white voters because on the

plans that are produced on the system at the Southern Regional Council we publish the demographics showing the white population and the white voting age population and the black population and the black voting age population and the system used by the State of Georgia doesn't.

Q. Why was this plan drawn on the State's computer as opposed to the Southern Regional Council's computer?

A. The State's computer contained the most current precinct boundaries and we wanted to draw the plan using the most up to date precinct boundaries so as not to split precincts.

Q. What other changes did you make compared to the existing plan?

A. In addition to the ones in Effingham[,] Chatham and Richmond there are a couple of areas where rural counties had been split in the Eleventh District, the Counties of Baldwin, Twiggs and Wilkes County. The splits in those rural counties were eliminated in this particular plan and they were primarily eliminated because our goal was to essentially restore the integrity of those rural political subdivisions and make the integrity of those subdivisions predominant. Clearly here in [*sic*] an attempt was made to draw a plan in which race was not the predominant factor. If race was predominant we would have drawn this plan at a lower level of geography.

Additionally the other principal change has to do with the border between the Eleventh and Fifth Districts. Currently the Fifth District extends from Fulton County across the border into DeKalb County and into what is known as east Atlanta. In ACLU1A the division

between the Fifth District and the Eleventh District is the county line.

Q. How many whole counties are there in 1A?

A. Do you want me to get up there and count them?

Q. Are there 14?

A. There are probably 14 or 15.

CHIEF JUDGE EDENFIELD: What was your question?

MR. McDONALD: I asked him how many whole counties were in this version of the Eleventh Congressional District?

A. There are 14 counties in the district that are intact.

Q. Why did you include 14 whole counties in the Eleventh?

A. As I previously mentioned one of the overriding goals was to try to show that it is possible to draw districts in the State of Georgia for members of Congress that did not use race as a predominant feature and on the other hand were fair to black as well as white voters.

During the special session there was much fuss made about maintaining the integrity of county boundary lines, particularly in the rural county areas and it was an [*sic*] almost defined as a litmus test in determining whether race was a predominating factor. So we determined it was necessary in this plan not to have any rural counties split.

Q. Did you construct the counties in the Eleventh to comply with one person one vote?

A. Yes, but a more overriding reason was to keep the

political subdivisions intact. I say that because sometimes when you tend to focus on keeping whole counties intact that has the effect of increasing the overall deviations of the plan. So I would say that respect for political subdivisions was the higher criteria.

Q. Were you concerned with retrogression?

A. As it relates to the border between the Fifth and Eleventh Districts that was a factor. Because the Fifth is an historical district that is protected under the Voting Rights Act. We were concerned that we preserve the Fifth District to offer the voters in metro Atlanta an opportunity to elect the candidate of their choice.

Q. Were you concerned about maintaining contiguity?

A. That is always a factor.

Q. What about protecting incumbents was that a factor?

A. It was not a predominant factor, but it was considered on the several occasions. I didn't know the home addresses of the incumbent Congressperson. Usually when I draw a plan I prefer to have the home addresses of the incumbents, but that was not available on the State system and that was not taken into account here.

Q. What is the total deviation in this plan?

A. .93.

Q. Would it be up [*sic*] possible, by splitting some additional counties in the plan, to lower that deviation?

A. Yes. Generally if you draw a plan at a lower level of geography you can get more precise and bring the deviations down to almost zero if you want to.

I have been involved in districting in Alabama where

the option that was presented was that the [*sic*] every district had to have exactly the same number of people.

Q. In constructing the Eleventh District was race a predominant factor that you took into account?

A. No.

Q. Did you subordinate traditional State redistricting principles in the construction of this plan?

A. No. If I can elaborate. I reviewed the State's history in congressional redistricting all the way back to the turn of the century to learn how congressional districts in Georgia were drawn. Then I focused on the 1970 and 1980 plans. I believe over there is the map of the 1980's congressional plan. One thing that struck me is that the State of Georgia has a history of drawing congressional districts that are vast in size.

In the 1970's as well as in the 1980's congressional districts encompassed 25 to 30 counties. The Ninth stretched all the way from the South Carolina border all the [way] down into Gwinnette County.

Another feature that I observed about the congressional districts is the State has a tradition of linking together urban and rural areas in congressional districting. What that led me to conclude, on the question of construction of the congressional districts, was that geographic compactness is not an absolute. In terms relative to the drawing of say a school board district I would look for a more insular group. But in a state that has congressional districts that stretch all the way from the Florida border to Jones County north of Macon, in looking at that type of history, I thought it permissible to draw such a district when you are balancing the rights of black and white voters.

Q. Did you attempt to address the issue of land bridges and avoid their use in your construction of the Eleventh?

A. Yes. Specifically in the existing plan there has been much talk about the so called Henry County land bridge. We felt it is was necessary to not have such a land bridge in the Eleventh Congressional District so that was eliminated.

Q. Could you have put all of Henry County into the Eleventh or taken it all out?

A. There are many options in the drawing of congressional districts because of their vast size. Essentially you link together a string of rural counties or urban counties and you come up with a congressional district with a population of approximately 589,000 people. We linked together a string of counties in constructing a number of options for the Eleventh District. Some of the counties were overwhelmingly white and some relatively mixed almost 50 percent black and white and some were slightly black in terms of majority population and we joined together those counties to the [*sic*] make the Eleventh Congressional District.

Q. Let me move on to the First District and ask you what changes you made in the First that are different from the existing First Congressional District?

A. The primary change in the First had to do with the first change I mentioned regarding the Eleventh. The most unacceptable feature of the Eleventh, from everyone I heard from, was the extension of the so-called tail into Effingham and Chatham Counties. Once that was removed it was necessary to take population out of the First so that population was taken out of the First and put into the Eighth. There were four counties that were moved Montgomery, Tattnal, Toombs—three

counties, and those three counties were taken out of First and put into the Eighth.

Q. That's because Effingham and Chatham Counties were included in their entirety in the First?

A. Yes. That was done to balance out the population in terms of one person and one vote. We moved Clinch County from the Eighth back to the First.

Q. Are there any split counties in your version of the First?

A. No, all of the counties are intact.

Q. I asked you a questions earlier with regard to the Eleventh about your decision to keep the counties intact. Would that answer be the same if I ask you why you kept the counties intact in the First?

A. Yes.

Q. Look at the Second. What changes did you make in the Second?

A. When I reviewed the Second there were two principal areas that jumped out at me and a couple additional areas that I was concerned with. The two principal areas were the way in which the Second extended up into Meriwether County. Our first goal was to correct that and to take Meriwether County out of the Second District altogether.

In ACLU1A Meriwether as well as Tolbot Counties are removed from Second Congressional District.

Q. Why did you remove Tolbot County?

A. Once I made additional changes, which I will speak to in a minute, the remaining reason was to balance out the population in terms of one person one vote.

The other feature I was concerned about, as it relates [to] the existing Second Congressional District, was the way the district enters Bibb County in the City of Macon. There was very narrow land bridge, if you will, in the way the district enters Bibb County. Our goal was a [*sic*] correct that and ACLUlA does that by taking additional voters out of Bibb County and the City of Macon and including them in the Second District. A number of those voters who were added were white voters. There were some other changes we made to the Second District.

Q. What were they?

A. There was a string of counties that were split in the Second District and they shared a border with the Eighth District. Our goal was to eliminate these county splits and return the counties to being whole.

Q. Can you tell us what those counties are?

A. Those counties are Lowndes, Colquitt Dougherty, Lee, Crisp, Dooly, Houston, Bleckley, Twiggs and Crawford.

Q. Did you reaggregate those counties for the same reason that you reaggregated counties in the other districts?

A. Yes.

Q. Did the rural urban factor come into play, in any way, in the construction of the Second?

A. Yes, in that, as I mentioned earlier in reviewing the State's history and particularly with regard to the construction of Eighth, Seventh and Ninth Districts, we started to link together urban and rural areas. In doing so there were a number of urban areas currently in the

Second that we have sought to retain. They are Columbus, Macon, Valdosta and Albany.

Q. Do you recall how many total unsplit counties are currently in your version of the district?

A. You have to excuse me. I have been looking at a large number of plans and after a while you start to forget how many counties are in each plan. 26 it [*sic*] what it looks like.

Q. The only counties that are split[,] that are split in Bibb and Muscogee in the Second?

A. That's correct.

* * *

Q. Were you aware of whether or not the county governments of Bibb and Muscogee had passed resolutions requesting that those counties remain split in any redistricting plan?

A. Yes.

Q. Did you take that into consideration in splitting those counties is [*sic*] ACUL1A?

A. That was a factor.

Q. Are the splits in ACLU1A the same as the splits in the existing plan?

A. No, they are not.

Q. In what ways are they different and why they are different?

A. I have described the way in which the Second enters Bibb County and the way Bibb County is split in the current plan. The split in ACLU1A in some ways resembles that split. In ACLU1A Bibb County is split

between the First and Third and in ACLU1A the same is true for Muscogee County.

Q. Were these splits based, in any way, on race?

A. No, they were not.

Q. What were the other factors?

A. It was the wish of the county commissioners to have more than one congressional representative. The second was the State had historically linked rural and urban areas together to form congressional districts.

Q. Have we discussed the [*sic*] all of the changes you have made to the Second District?

A. Not in detail, but we have covered them.

Q. What, if any, changes were made to the Third district in ACLU1A compared to the existing plan?

A. The changes to the Third District basically resulted from the changes made in the Second and Eleventh Districts. Tolbot was moved to the Third District having previously been in the Second and Baldwin County was included in the Third District. The other principal change that occurred had to do with Clayton County.

I have mentioned that we were concerned about having taken a portion out of DeKalb out of the Fifth District. To compensate for voters, who were predominantly black, who were taken out of the Fifth District to make the county line the dividing line between the Fifth and Eleventh. When those voters were taken out of the DeKalb County portion of the Fifth we basically extended the Clayton County portion of the Fifth District. So we extended the Clayton County portion of the Fifth District. So there were additional voters taken out of the Third.

Q. There are 11 intact counties in the Third; is that right?

A. Yes.

Q. I won't ask you to repeat all of your testimony, but did you keep those counties intact for the same reasons you did in the other districts?

A. Yes.

Q. As to the Third District, as a whole, was race a predominanting [*sic*] factor in the construction of the plan?

A. No, race was not a predominanting [*sic*] factor in the construction of the Third District. Nor was it a predominant factor in the construction of this plan.

* * *

Q. Will you explain what, if any, changes were made to the Fourth District and tell us why they were made?

A. The changes in the Fourth District were minimal. Primarily it involved some precinct changes in Gwinnette County between the Fourth and Tenth Districts and they were made to compensate for shifts in population that occurred in the Tenth once we corrected that constitutional defect in Richmond County and put Wilkes County back as a whole country.

Q. Was the purpose for those changes predominantly based on race?

A. No. The purpose was predominantly one person one vote.

Q. What changes did you make in the Fifth and why?

A. There was an additional change in the Fourth, which was in DeKalb County in the southern most part

in the City of Decatur there were a couple of precinct chages. That was done to balance out the population.

Q. What changes were made in Fifth and why?

A. The most striking change was to eliminate this extension of the Fifth into DeKalb County and to make the DeKalb Fulton County line the dividing line between the two districts and that took some population out of the Fifth which was compensated for with the extension into Clayton County.

In addition to that the northern part of the Fifth District was enhanced by removing some of the border to [*sic*] in the most northern part of Fulton County.

Q. Was the predominant purpose of those changes based on race in those counties?

A. No, those chages were made to balance out population. A very important goal was compliance with the Voting Rights Act to make sure that the redesigning of the Fifth District did offer African America[n] voters a full opportunity to elect the candidate of their choice.

Q. What was the racial composition of the changes that were made? In this area of DeKalb, for example, was that predominantly black?

A. Yes, it was. The area of DeKalb that was removed from the Fifth that portion of Atlanta on both sides of the county line the population is pretty solidly black.

Q. And the area of Clayton County that you put in was it substantially of the same racial composition of the area that you took out?

A. A substantial portion of the popualtion was black, but there were also some whites who tended to vote Democratic.

Q. So was it a non-racial change or did you exclude more blacks than you brought in by making the DeKalb, Clayton County exchange?

A. The portion of the Fifth District that was taken out of DeKalb County to make the dividing line the county line that portion was, I would say, about 95 percent black. The portion of Clayton County that was included in the Fifth was not as heavily black as it was in the DeKalb County portion.

Q. What was the reason or purpose for making that exchange?

A. To prevent retrogression.

Q. Look at the Sixth Congressional District. What changes did you make there?

A. The changes there were very minor. There were a couple of precinct chanes in Gwinnette County similar to what I have described in the Fourth and the Tenth. I believe there were two precinct changes in Cobb County in the area where the Seventh is next to the Sixth.

Q. So there were no counties added or taken out?

A. That's right.

Q. What was the purpose of the changes in the precinct?

A. That was to comply with one person one vote. In addition this option was an attempt to the [*sic*] correct the constitutional defect in the Eleventh and the assumed constitutional defect in the Second and to preserve the remaining districts, as much possible, intact.

Q. What about the Seventh, what changes were made there?

A. The principal change would be the inclusion of Meriwether County into the Seventh and that was done for the purpose one person one vote after Meriwether was removed from the Second because it had been determined by the panel of judges as being unacceptable in terms of its appearance.

Q. No other counties were added or deleted?

A. No.

Q. Cobb is split in the Seventh in your version?

A. Yes, in pretty much the same way it was.

Q. Why did you retain that split?

A. My instructions from you in this option was to present to the Court a plan which corrected the constitutional defect in the Eleventh and the assumed constitutional defect in the Second and to keep the remaining districts unchanged as much possible.

Q. Had you corrected the split in Cobb would be [*sic*] you have had to make other changes to compensate for the addition or loss of population?

A. Yes, sir.

Q. Would that have entailed significant changes?

A. Cobb County is part of metro Atlanta so the population there, like in Fulton, DeKalb and Gwinnette, is very dense. So when you move a precinct in Cobb County it is like moving a rural county.

Q. What changes did you make in the Eighth District?

A. In the Eighth district the changes were primarily made to compensate for the changes I described in the Second and the changes that were made in the First and

the changes that were made in the Eleventh. So I included the counties Montgomery, Toombs and Tattnall into the Eighth District and they were previously in the First. I excluded Clinch County as I mentioned previously and reunited Houston as one county and then the extension into Bibb County does not exist.

Q. Now, you excluded Clinch was that to comply with one person one vote?

A. Yes.

Q. Were the changes you made in the Eighth based on race?

A. No. One person one vote was the major factor. The other predominant factor, in terms of the changes in the Eighth, was to keep intact political subdivisions. Because the string of counties in the Eighth that shared their border with the Second, as mentioned earlier there were a number of counties that were previously split in the current plan, all of those counties were reunited.

Q. Did you make any changes in the Ninth District?

A. No, there were no changes in the Ninth.

Q. So the Ninth remains as it currently is?

A. That's correct. It stays as it currently is.

Q. The last district is the Tenth what changes did you make there?

A. Wilkes County is a whole county in the Tenth resulting from eliminating this split in the Eleventh District. In addition in Richmond County I took in a larger portion of the white population in Richmond County and moved it from the Tenth and added it to the Eleventh. Those were the principal changes. As I mentioned earlier there were also a couple of precinct changes in Gwinnette County.

Q. What was the purpose of those changes in the Tenth?

A. It was to balance out population.

Q. Were any of the changes made in the Tenth based on race?

A. No.

Q. Is there any single rural county that is split in ACLU1A?

A. No. In drawing ACLU1A we were very particular in reuniting all of the rural counties which are currently split in the existing congressional districting plan and which were split in some of the earlier versions of plans we had developed. That was done primarily because there was much talk about the splitting of rural counties as being sort of a litmus test and we have eliminated all rural county splits. The only counties that are split are in this plan are the larger more densely populated metropolitan areas of the State.

Q. Would it be possible to draw other plans that were in the so called least disruptive plan category or is this the only version you could possibly do?

A. Could you restate your question?

Q. Is it possible to draw other plans in the so called category of least disruptive or least change, but cure the constitutional defects in the existing plan or is this the only possible plan?

A. Yes, sir, I believe it is possible to draw other plans. I have prepared an option which leaves Richmond County completely out of the Eleventh District. So it depends on what your motivation is.

In the Legislature there was a feeling that some peo-

ple would not pass a plan if Richmond County were split or was part of the Eleventh. Depending on your goal it's possible to prepare other options.

Part of my responsibility in working with the special session was to review the plans of others for fairness and I reviewed the Amicus Plan and the version before the one called Amicus Plan. That plan came pretty close to what I would call the least change plan, but the Eleventh District was not in Richmond County.

Q. Did Mr. Hill prepare this plan ACLU1A?

A. No, I supervised its preparation and I was surprise[d] when I heard that here today. He did not prepare that plan.

Q. I'm not going to ask you ~~in~~ detail about the other plans, but I think it would be helpful for you to tell us briefly what you attempted to do when you prepared the first three plans that were filed with your orininal declaration and the supplemental declaration that were received in evidence.

A. Those plans were developed either shortly before the special session convened or during the special session. The three plans you mentioned were developed with the express purpose of presenting options before the legislative black caucus. The goal was to develop a plan that could achieve the number of votes necessary to pass both houses. In preparing those plans the overriding goal was to show that it was possible to be fair to both black and white voters in the s[t]ate and to comply with the Court's directive in Miller v Johnson.

In that regard the first plan had some county splits that were eliminated and the goal was eliminating those county splits. As we moved from the first to the third plan our goal was to remove all of the splits in the rural

counties and to also develop a plan that would basically serve as a basis for the formation of a coalition between black and white Democrats and be able to pass both houses.

By the time we got to the third plan our goal was to eliminate all splits in rural counties and to redraw all of areas of [*sic*] in the state outside of the Fifth, Eleventh and the Second pretty much the way white Democrats wanted them drawn with the hope that it would allow white and black Democrats to form a coalition and get a plan passed by both houses.

For example in that plan the Seventh District was drawn exactly as the Speaker wanted it. The First is draw[n] exactly the way the Chairman of the House Reapportionment Committee wanted it. The Ninth District was d[r]awn close to the way the Lieutenant Governor wanted it drawn.

Q. Was that plan endorsed by either house?

A. The plan which passed in the House was derived from that plan.

Q. Which plan?

A. The third one. The plan which passed the House was derived from the plan that I just described and the principal difference was in the Eleventh District. The Eleventh District did not encompass all of the rural counties that that plan encompassed. We stopped in Washington County and did not go all the way in. Other than that the plan that passed in the House is almost identical to the plan I described here.

MR. McDONALD: Thank you, very much.

* * * * *

CROSS-EXAMINATION

BY MR. PARKS:

Q. Mr. Carter, with respect to the ACLU1A plan is it your position that the configuration of the Eleventh District in that plan is mandated by the Voting Rights Act?

A. My position is that ACLU1A was drawn in response to a request I received from Mr. McDonald to prepare a least change plan.

Q. I understand that, but is it your position that in the racial consideration that you testified to, leaving aside whether is was a predominant, intermediate or insignificant factor, the racial considerations do you feel they were mandated by the Voting Rights Act or are just a product of your attempt to draw a minimally disruptive plan?

A. I believe the word mandated is one I'm not sure of.

Q. Required?

A. I will answer that in the way I understand it I'm not sure it's mandated. There are lots of differences of opinion in the aftermath of Miller v Johnson and Shaw v Reno as to how you balance the interest of the requirements of the Voting Rights Act with what is now the law.

* * * * *

MR. PARKS: I have not heard an answer.

A. Essentially I believe the jurisdiction between state governments and voting right advocates are confused on that question. I sat through a number of conferences. I sat through the special session of the Legislature. I have talked to a number of people and find that there is a general disagreement as to how you balance the interests of the Voting Rights Act against the descision [*sic*] of this Court and the Supreme Court in Johnson v. Miller. I do believe as a result of Thronberg v. Jingles a state has an obligation to draw a district that is fair to minority voters if the geographical distribution of voters is such that such a district can be drawn. I believe the Eleventh District is such a district that can be drawn because I believe in the past the state has drawn districts just as vast. Does that answer your question?

Q. I don't know.

A. It's more complicated than that. I don't know.

Q. But you can't say for sure whether it is or not?

A. I have answered your question, basically in the way I just did.

Q. I am not suggesting there is a definitive answer, but I didn't hear a definitive answer.

A. I will tell you what it depends on is geographic compactness. Geographic compactness is a very subjective term. What is geographically compact to me may not be geographically compact to you. That's why that question is so difficult to answer.

* * * * *

Q. Now, if you have the same difficulty as you had

with in the question I asked you about the ACLU minimal disruption plan you can just say I have the same difficulty without going into that long response.

In your opinion is the Eleventh Congressional District, as configured in this Amicus R Plan, required by the Voting Rights Act?

A. The same difficulty.

* * * * *

Q. Mr. Carter, you told any number of people during that session that to be politically acceptable to the black caucus there had be a second congressional district that was majority black?

A. Yes, sir.

Q. Regardless of whether it was required by the Voting Rights Act or not for the black caucus to support any plan it had to include a second majority black district?

A. I do not recall making any reference to the Voting Rights Act.

Q. But in you own mind that was the reality?

A. Yes.

* * * * *

Q. That's why I asked you the question because my reading of the position of the Abrams Intervenors, as you have described it, is there isn't a single plan ACLU, black caucus or your organization that you can say under oath is required by the Voting Rights Act in terms of a second minority, majority district?

A. I believe that we are in gray area of the law. It used to be clear a couple of years ago and it is not as clear now as it used to be.

* * * * *

Q. But you would agree that there could still be clear cases wherein a minority district would be required by the Voting Rights Act?

A. I believe that's true.

* * * * *

Q. You don't make the distinction that the district was not reflective of a true community of interest. You are saying it isn't as bad off as some others in the past and therefore why not?

A. Repeat that, please.

Q. You are not saying the Eleventh District is reflective of any real true community of interest. Instead you are saying it has a sufficient degree of geographic compactness to merit consideration?

A. I haven't done an analysis for this presentation here today.

* * * * *

REDIRECT EXAMINATION

By MR. McDONALD:

Q. Mr. Carter, let me direct your attention to the 1972 Congressional redistricting plan to Congressional District One?

A. Yes.

Q. Can you tell us whether in this district you have any counties that strung together in a single file marching from the south up to the north?

A. Yes, that was one of the districts that struck me when I was struggling with this plan in terms of drawing it. One of the first things that struck me was the State's history in drawing these type districts. There you have a district that runs from the Florida border up to Augusta.

Q. Is that a land bridge?

A. The term land bridge is not one that I have embraced. I have never use that on my own.

Q. Let me hand you this map and ask you to identify it.

MR. McDONALD: I would like to [have] that marked as Abrams Intervenors Exhibit 37.

Q. Handing you what has now been marked as Abrams Intervenors number 37, can you identify that for me?

A. It looks like the plan which passed in the Georgia House.

Q. Judge Edenfield asked the question earlier whether or not it is possible to construct a plan that contained two minority majority districts that didn't have a wall across the state. Can you tell me whether or not that is the case with Abrams Intervenors number 37?

A. Yes, sir. You can see it again in the Eleventh district which does not stretch across the state. It extends from DeKalb to Jefferson County. So there are still a couple of counties between the Eleventh District and the state border. The question of minority majority is really tricky. If you look at black voting age population it is only 50.41 percent. It is a very integrated district.

Q. What is the total minority population in this district?

A. The district is 53.37 percent black.

N. ARGUMENT: DAVID WALBERT

[Excerpts from Hearing Testimony, 10/30/95-10/31/95 Tr. p. 378, lines 18-25; p. 379, lines 9-13 and 21-23; p. 380, lines 2-24; p. 384, lines 2-4.

Section Five doesn't apply to this Court. If this Court draws a plan Section Five doesn't put a bench mark on this Court and this panel of three judges. There was a Section Five discussion earlier with Mr. Brumby about whether if the Speaker submitted a plan is that a Section Five covered plan. He has authority in his brief suggesting that may be.

* * *

Be that as it may the bench mark for Section Five if this were a legislative plan, and I think the Court should put itself in the shoes of the legislature when it is drawing a plan, the bench mark here is clearly the '82 plan.

* * *

It is our position that the '82 plan, being the last constitutional plan, has to be the bench mark.

MR. WALBERT: Yes, your Honor, that's definitely our position.

To address the Section Two question. It is pretty clear that this Court in devising a remedy has to make a determination as [to] whether Section Two does or does not apply to any plan that is adopted by this Court. We have a pretty strong opinion on this. I guess the first thing I will say is we take very strong issue with the Justice Department's view that they advocate that Section Two is required. I will say this with all due respect to the Justice Department lawyers, but what they are doing here is exactly what they were doing in 1991. The old game, if you will, that this Court criticized

and which the Supreme Court criticized, the old game was if you didn't do it disprove why you didn't do it and since you can't disprove why you didn't do it intentional and purposeful were applied. The old game was intent and purposeful were applied because of your inability to disprove that you didn't go to Chatham because of race or didn't go to in Richmond County because of race. It all boiled down to an inability to disprove.

* * * * *

Section Two we very much disagree that Section Two mandates there be two black members majority districts under its mandates.

O. TESTIMONY OF LINDA MEGGERS

[Excerpts from Hearing Testimony, 10/30/95-10/31/95
Tr. p. 430, line 3-p. 434, line 8, p. 438, lines 12-17]

DIRECT EXAMINATION

BY MR. PARKS:

Q. Were you involved during the special session with regard to attempting to redistrict the State of Georgia to correct the unconstitutionality that had been found within the existing redistricting plan?

A. Yes, sir.

Q. During the course of that involvement did you make an effort to construct a second minority majority district that was consistent with your reading of Miller versus Johnson and the Voting Rights Act?

A. Yes, sir. I started out from two different angles. What I did is I sat down by myself after the decision came out and before anyone could talk to me and I read it three times to see how I understood it. I know I'm not an attorney and I can't quote the law of the case, but I feel I have to understand it before I can help the people I work with. It seemed to me there was a lot of talking about the only thing that was unconstitutional about the Eleventh District was the fact it had an arm going through Screven and down to Chatham and that's all we needed to do to fix it. As I looked at it and as I understood the Court decision from both this Court and the Supreme Court the idea that I think came out of the Supreme Court decision was why did we have [to] draw the Eleventh District like we did in 1991?

To be honest with you I was really partly at fault for drawing it like we did in 1991. In my understanding of it I thought the Department of Justice was going to make

us do. Prior to the work in 1991 there had been an understanding arrived at by the leadership in the legislature with the black caucus that we are going to draw a second minority district and you can have it. I think at that time we understood that to mean under our normal interpretations of the Voting Rights Act meaning compactness, contiguous and community of interest.

I looked at that in two different ways to draw that. One of the major efforts I made by myself at that time was to look over to east central Georgia. If you will look at the race map there is a heavy concentration up here and I think we talked about how all that got added to DeKalb county to begin with. I looked into the metro area and none of [the] ways I drew ever showed a total of a 50 percent minority population. At that time we were talking about an effective black district being 60 percent. At the first public hearing we were presented by the head of the Republican party a map that literally, he said, had been faxed to him about an hour before that. That plan drew it from south DeKalb over to Augusta and then to Macon. The initial response in our office was that's ridiculous. We don't have draw that do we? I was the one who said if it was there we have to draw it. It was said that it doesn't make any sense and I said maybe not, but I think we may get in trouble with the Justice Department if we don't draw the State of Georgia like that and I think that was probably the main reason they went in that direction.

After this decision in Miller v Johnson came out I sat down and I read that again and I said why would draw it that way? If you are going to look at motivation what other reason would you ever have for coming out of south DeKalb like that? What other reason would you have for putting Burke County with south DeKalb? What would Johnson County ever have in common with

south DeKalb? So even looking at cleaning up the Eleventh from the way we drew it in 1991 I didn't think satisfied the constitutional requirements. I needed to look at another way to create a second minority majority district.

All of us were aware that Speaker Murphy, even after the court decision, said that he thought you ought to have two minority majority seats in Georgia. If I look at the guidelines and I hear people say the Supreme Court left all of this confusion. I don't think they left that much confusion in my mind. They told me that if black populations were compact, contiguous and had a community of interest they should be kept together. I have always understood that and that didn't bother me. I thought that was a traditional interpretation of the Voting Rights Act. They also said that you use traditional redistricting principles. I had been working on this since 1971 and I thought I had a pretty good handle on what traditional redistricting principles were in Georgia.

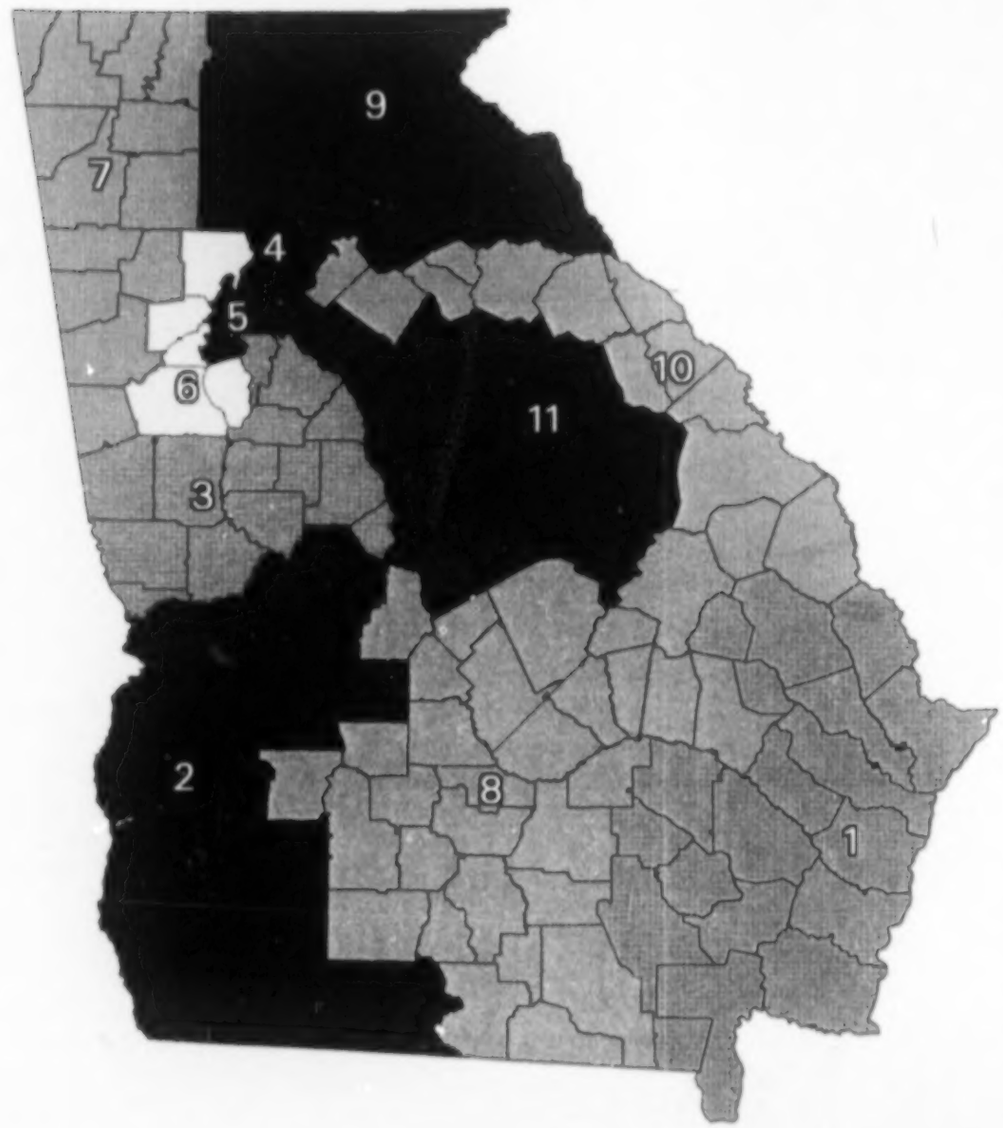
I looked at that and I looked at the race map because I do think that you take race into consideration. They are 27 percent of the population and if we are going to look at distributing political power which I think that's what redistricting is all about. The concentrations that you have are still in the metro Atlanta area. That is the one concentration you have if you are looking at compactness, contiguity of population and community of interest, you have urban areas, you have areas of interest. Beyond the color of skin I think there is probably other interests that blacks have in common, but putting that aside there should be areas of interests. That was the place where I started, to be honest with you.

* * *

Q. Consistent with your understanding of the decision in Miller v Johnson and the Voting Rights Act a second minority majority district was not, at least in your opinion, possible?

A. Not one that said 50 percent on the page in 1990, no, sir, it was not.

1995 House-Passed Plan
(MSLSS)



Library: Georgia

Plan: lit16620124hse

Districts

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County Boundaries

Scale in Miles

0 0.5 1.0 7.5 15

Prepared by:
United States Department of Justice
Washington, D.C., 20530

June 19, 1996

User: Temporary Account Date: 06/20/96

Room: 941 Time: 9:32 AM

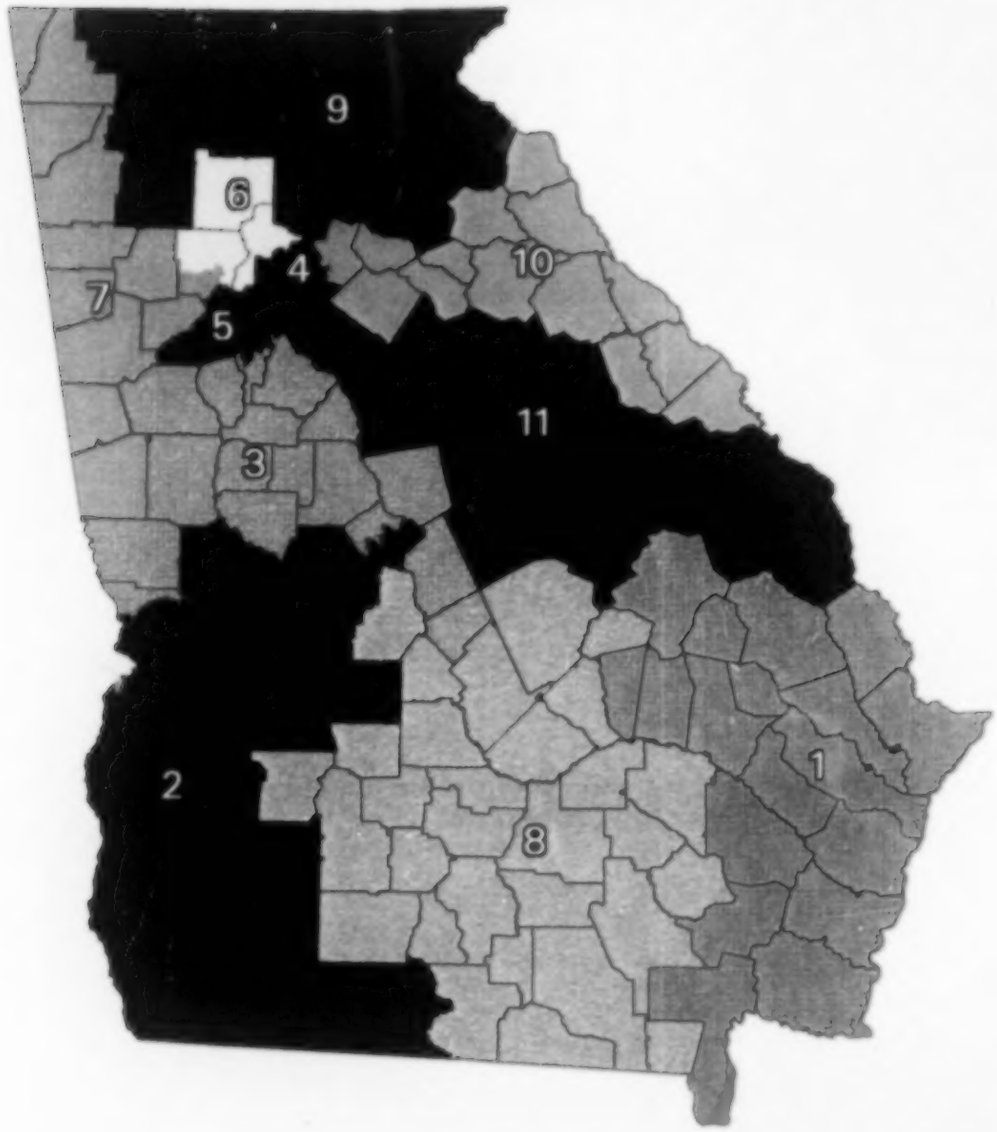
Plan: LIT16620124HSE Report: housepassed. rep

Population Summary Report Plan MSLSS
(House Passed)

Dist :	TOTAL	DEVIATION	DEV%	WHITE%	BLACK%
1 :	588541	-388	-0.07	67.58	30.55
2 :	587583	-1346	-0.23	59.54	39.21
3 :	589276	347	0.06	73.09	24.80
4 :	589277	348	0.06	55.02	40.36
5 :	590666	1737	0.29	39.57	58.01
6 :	589268	339	0.06	91.36	5.80
7 :	588249	-500	-0.08	85.15	13.70
8 :	587912	-1017	-0.17	67.92	31.07
9 :	589420	491	0.08	94.68	3.65
10 :	588495	-434	-0.07	85.48	12.69
11 :	589349	420	0.07	61.78	36.67

Total Population	:	6478216
Ideal Population	:	588929
Mean Deviation is	:	0
Mean Percent Deviation is	:	0
Largest Positive Deviation is	:	1737
Largest Negative Deviation is	:	-1346
Overall Range in Deviation is	:	3083
Overall Range in Deviation% is	:	0.52

Lewis/Gingrich Plan
(AMICUSR)



Library: Georgia

Plan: lit16620124amicusr

Prepared by:
United States Department of Justice
Washington, D.C. 20530

June 25, 1996

User: Temporary Account Date: 06/25/96

Room: 941 Time: 9:30 AM

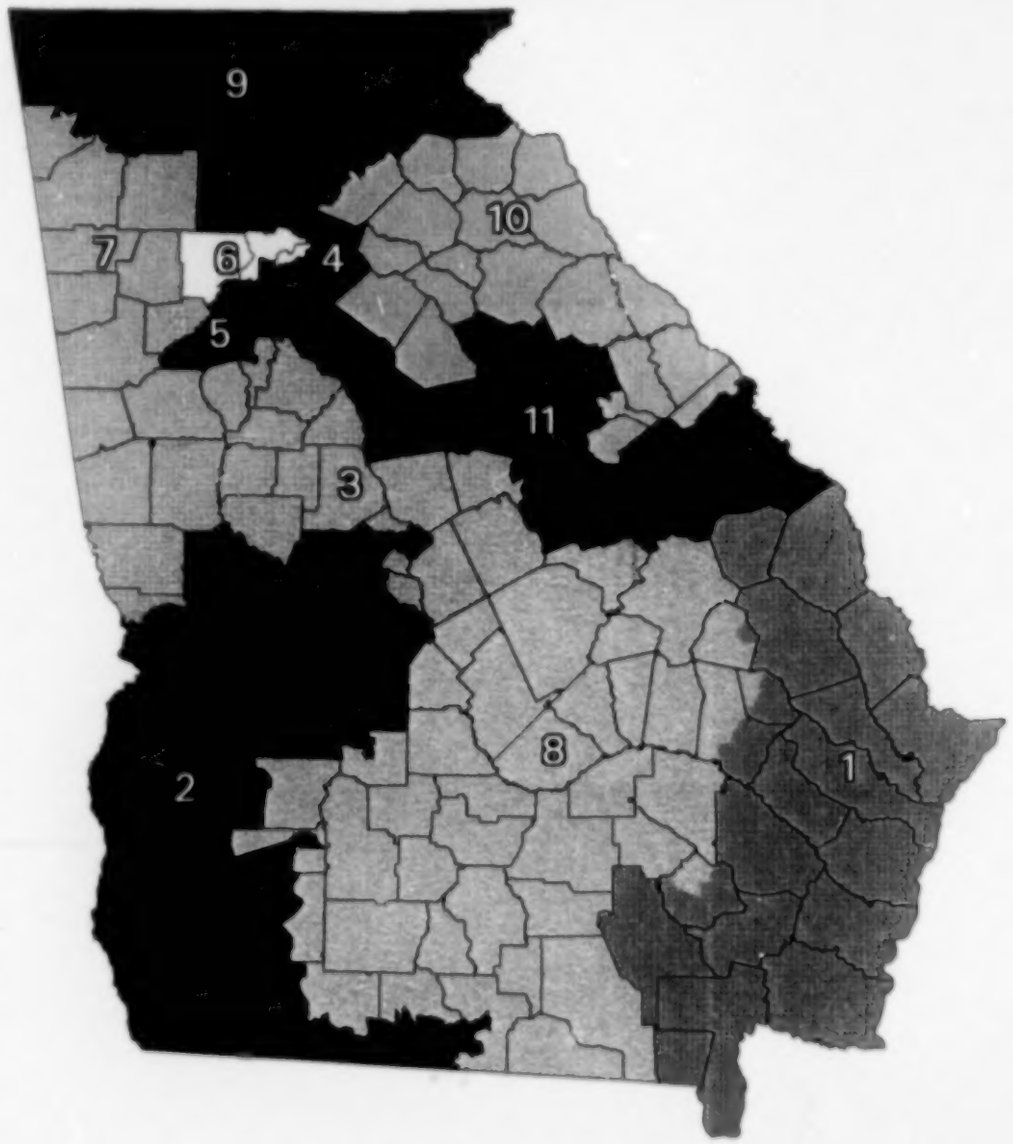
Plan: LIT16620124AMICUSR Report: popsum. rep

Population Summary Report Plan AMICUSR

Dist :	TOTAL	DEVIATION	DEV%	WHITE%	BLACK%
1 :	589329	400	0.07	67.62	30.49
2 :	591188	2259	0.38	49.09	49.41
3 :	588137	-792	-0.13	78.74	20.03
4 :	583497	-5432	-0.92	85.03	9.72
5 :	586998	-1931	-0.33	40.01	57.33
6 :	592594	3665	0.62	91.54	6.03
7 :	594440	5511	0.94	87.06	11.81
8 :	584623	-4306	-0.73	72.07	26.74
9 :	590603	1674	0.28	93.56	4.76
10 :	589636	707	0.12	72.04	25.86
11 :	587171	-1758	-0.30	44.05	54.65

Total Population	:	6478216
Ideal Population	:	588929
Mean Deviation is	:	0
Mean Percent Deviation is	:	0
Largest Positive Deviation is	:	5511
Largest Negative Deviation is	:	-5432
Overall Range in Deviation is	:	10943
Overall Range in Deviation% is	:	1.86

Abrams Plan A
(SRC/ACLU Plan A)



Library: Georgia

Plan: lit16620124abramsa

DISTRICTS

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County Boundaries

Scale in Miles

0 62.5 125 250 500

Prepared by:
United States Department of Justice
Washington, D.C., 20530

June 22, 1996

User: Temporary Account Date: 06/22/96

Room: 941 Time: 4:29 PM

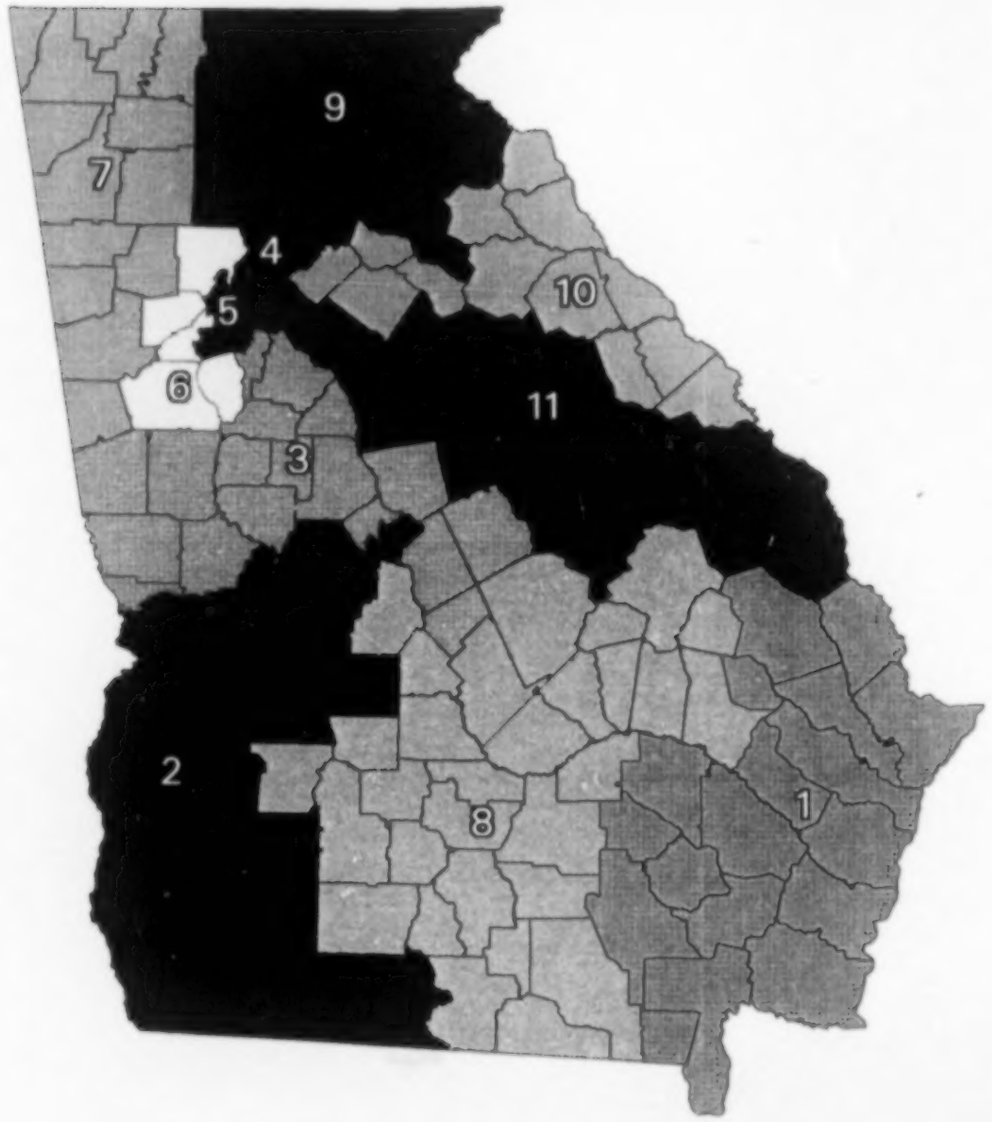
Plan: LIT16620124ABRAMSA Report: popsum. rep

Population Summary Report Abrams Plan A

Dist :	TOTAL	DEVIATION	DEV%	WHITE%	BLACK%
1 :	588455	-474	-0.08	67.74	30.56
2 :	588499	-430	-0.07	44.11	54.45
3 :	588995	66	0.01	77.39	21.09
4 :	590178	1249	0.21	86.38	8.67
5 :	588878	-51	-0.01	40.84	56.70
6 :	588851	-78	-0.01	89.34	7.80
7 :	588720	-209	-0.04	85.96	13.07
8 :	588846	-83	-0.01	73.98	24.81
9 :	589360	431	0.07	96.38	2.48
10 :	588869	-60	-0.01	77.25	20.49
11 :	588565	-364	-0.06	41.65	56.56

Total Population	:	6478216
Ideal Population	:	588929
Mean Deviation is	:	0
Mean Percent Deviation is	:	0
Largest Positive Deviation is	:	1249
Largest Negative Deviation is	:	-474
Overall Range in Deviation is	:	1723
Overall Range in Deviation% is	:	0.29

Abrams Plan C
(SRC/ACLU Plan C)



Library: Georgia

Plan: lit16620124abramsc

DISTRICTS

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County Boundaries

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Scale in Miles
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Prepared by:
United States Department of Justice
Washington, D.C., 20530

June 19, 1996

User: Temporary Account Date: 06/20/96

Room: 941 Time: 8:54 AM

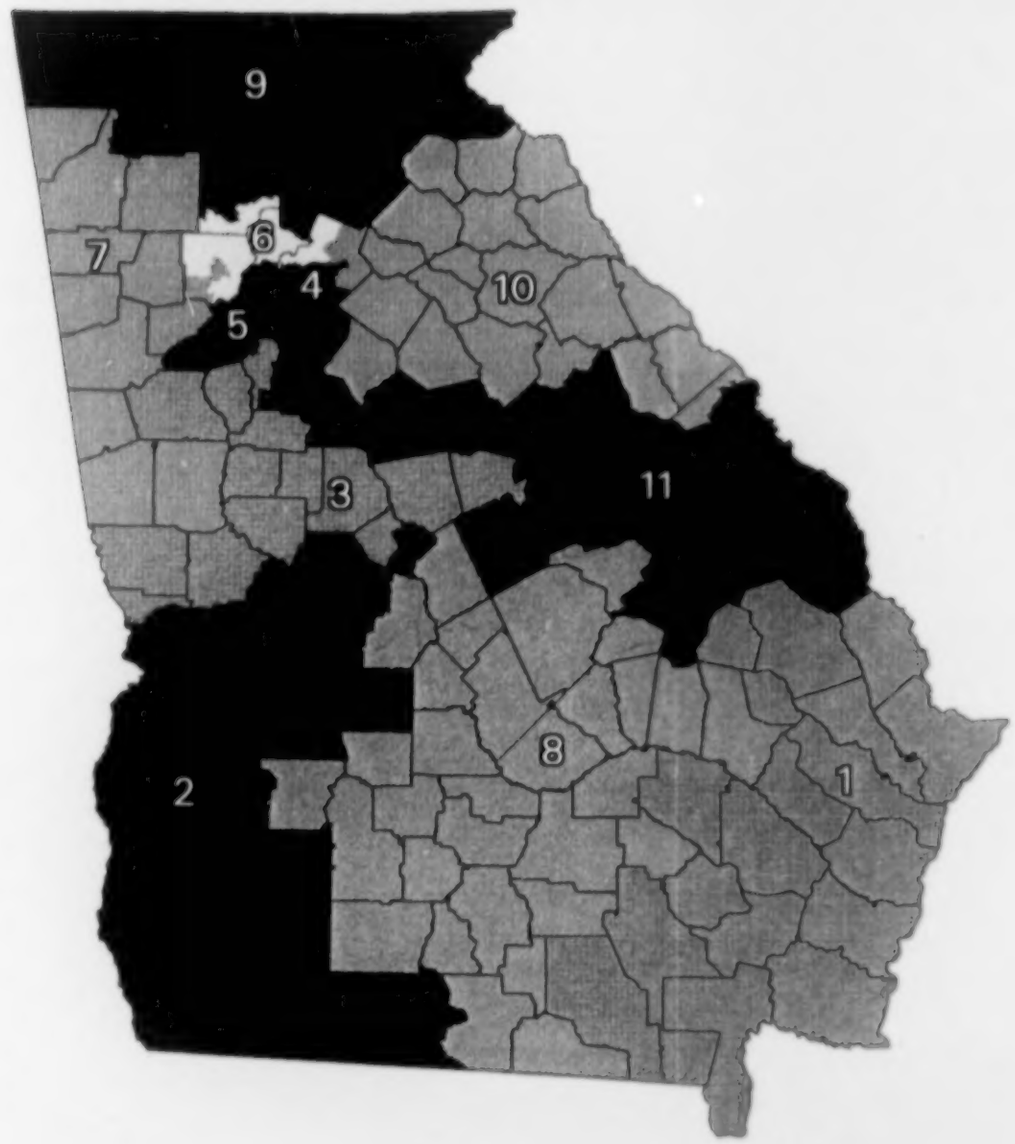
Plan: LIT16620124ABRAMSC Report: abramsc2. rep

Population Summary Report ABRAMS Plan C

Dist :	TOTAL	DEVIATION	DEV%	WHITE%	BLACK%
1 :	586191	-2737	-0.46	68.73	29.57
2 :	590278	1350	0.23	48.71	49.80
3 :	589649	721	0.12	76.60	22.06
4 :	590029	1101	0.19	85.20	9.49
5 :	590261	1333	0.23	40.29	57.09
6 :	590284	1356	0.23	88.42	9.44
7 :	584478	-4450	-0.76	91.24	7.75
8 :	587761	-1167	-0.20	70.94	27.68
9 :	588747	-181	-0.03	90.41	7.69
10 :	590248	1320	0.22	75.96	22.10
11 :	590290	1362	0.23	44.86	53.66

Total Population	:	6478216
Ideal Population	:	588929
Mean Deviation is	:	1
Mean Percent Deviation is	:	0
Largest Positive Deviation is	:	1362
Largest Negative Deviation is	:	-4450
Overall Range in Deviation is	:	5812
Overall Range in Deviation% is	:	0.99

Abrams Plan ACLU1A



Library: Georgia

Plan: lit16620124aclu1a

Scale in Miles

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Prepared by:
United States Department of Justice
Washington, D.C., 20530

June 23, 1996

User: Temporary Account Date: 06/23/96

Room: 941 Time: 12:35 PM

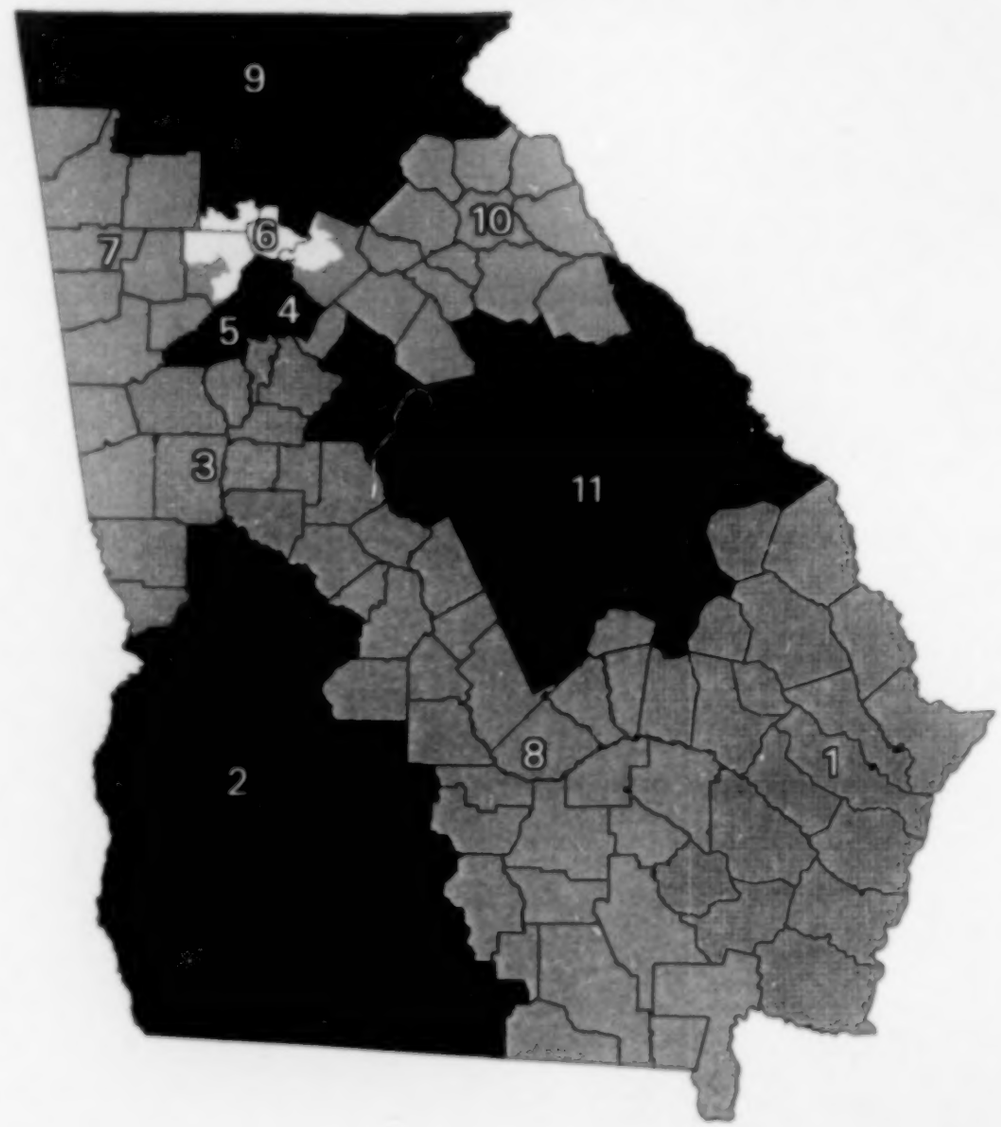
Plan: LIT16620124ACLUIA Report: popsum. rep

Population Summary Report Abrams Plan ACLU1A

Dist :	TOTAL	DEVIATION	DEV%	WHITE%	BLACK%
1 :	590529	1600	0.27	68.51	29.79
2 :	589281	352	0.06	48.74	49.75
3 :	590244	1315	0.22	78.26	20.11
4 :	585946	-2983	-0.51	84.80	10.19
5 :	590241	1312	0.22	38.60	58.98
6 :	589137	208	0.04	91.36	5.97
7 :	590462	1533	0.26	84.53	14.36
8 :	591442	2513	0.43	71.06	27.58
9 :	586222	-2707	-0.46	94.65	3.67
10 :	586262	-2667	-0.45	78.69	19.66
11 :	588450	-479	-0.08	42.14	56.27

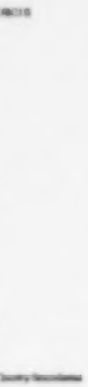
Total Population	:	6478216
Ideal Population	:	588929
Mean Deviation is	:	0
Mean Percent Deviation is	:	0
Largest Positive Deviation is	:	2513
Largest Negative Deviation is	:	-2983
Overall Range in Deviation is	:	5496
Overall Range in Deviation% is	:	0.94

Plaintiffs' Remedy 4



Library: Georgia

Plan: lit16620124remedy4



Scale in Miles

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Prepared by:
United States Department of Justice
Washington, D.C., 20530

June 22, 1998

User: Temporary Account Date: 06/20/96

Room: 941 Time: 9:41 AM

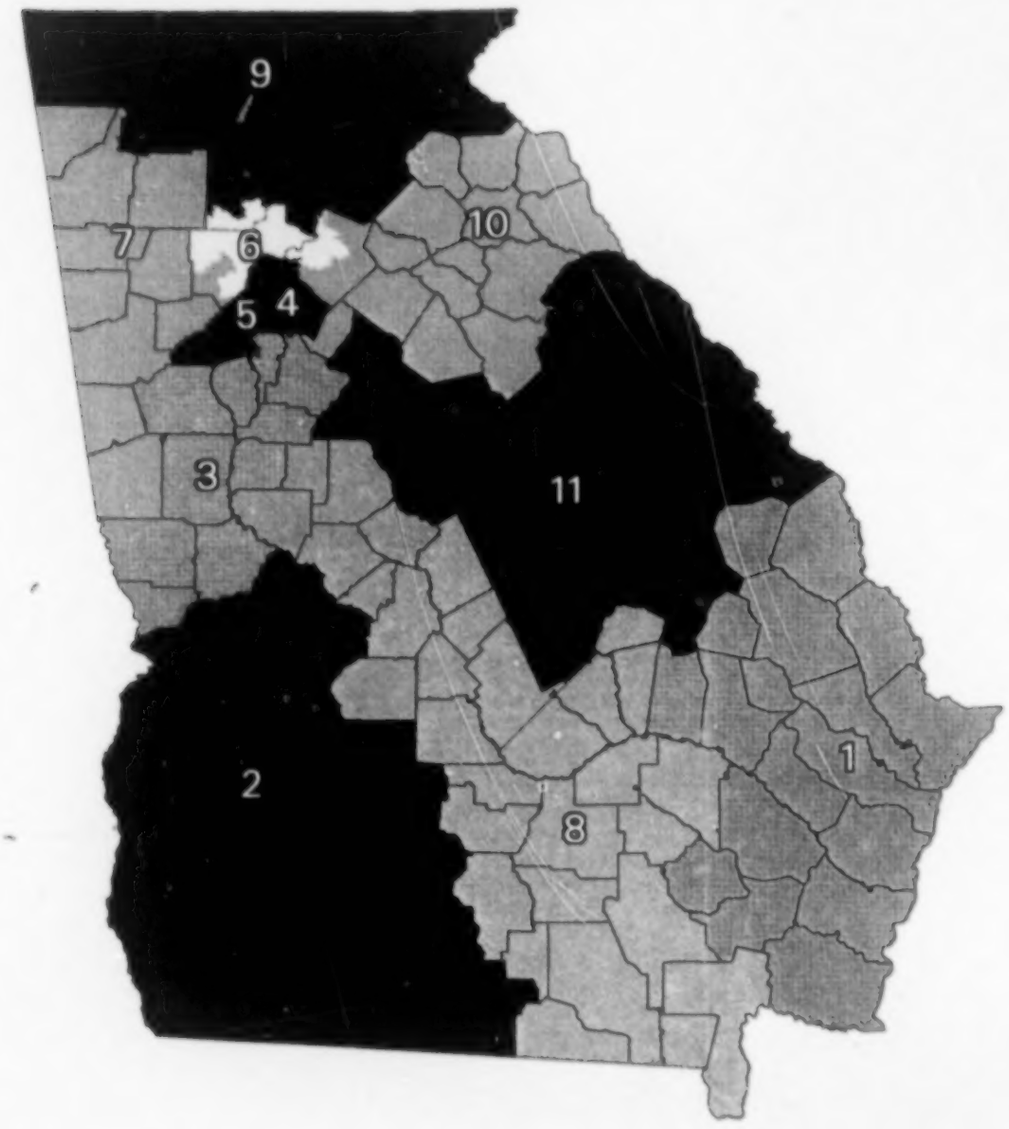
Plan: LIT16620124REMEDY4 Report: popsum. rep

Population Summary Report Plaintiffs' Remedy 4

Dist :	TOTAL	DEVIATION	DEV%	WHITE%	BLACK%
1 :	588541	-388	-0.07	67.58	30.55
2 :	594107	5178	0.88	59.29	39.47
3 :	589774	845	0.14	73.61	24.18
4 :	589277	348	0.06	55.02	40.36
5 :	583644	-5285	-0.90	39.03	58.62
6 :	587419	-1510	-0.26	91.34	5.81
7 :	593007	4078	0.69	85.24	13.61
8 :	587912	-1017	-0.17	67.92	31.07
9 :	589420	491	0.08	94.68	3.65
10 :	584570	-4359	-0.74	85.57	12.60
11 :	590545	1616	0.27	61.69	36.77

Total Population	:	6478216
Ideal Population	:	588929
Mean Deviation is	:	0
Mean Percent Deviation is	:	0
Largest Positive Deviation is	:	5178
Largest Negative Deviation is	:	-5285
Overall Range in Deviation is	:	10463
Overall Range in Deviation% is	:	1.78

Plaintiffs' Remedy 4X



Library: Georgia

Plan: lit16620124new4x

Prepared by:
United States Department of Justice
Washington, D.C., 20530

June 19, 1996

User: Temporary Account Date: 06/20/96

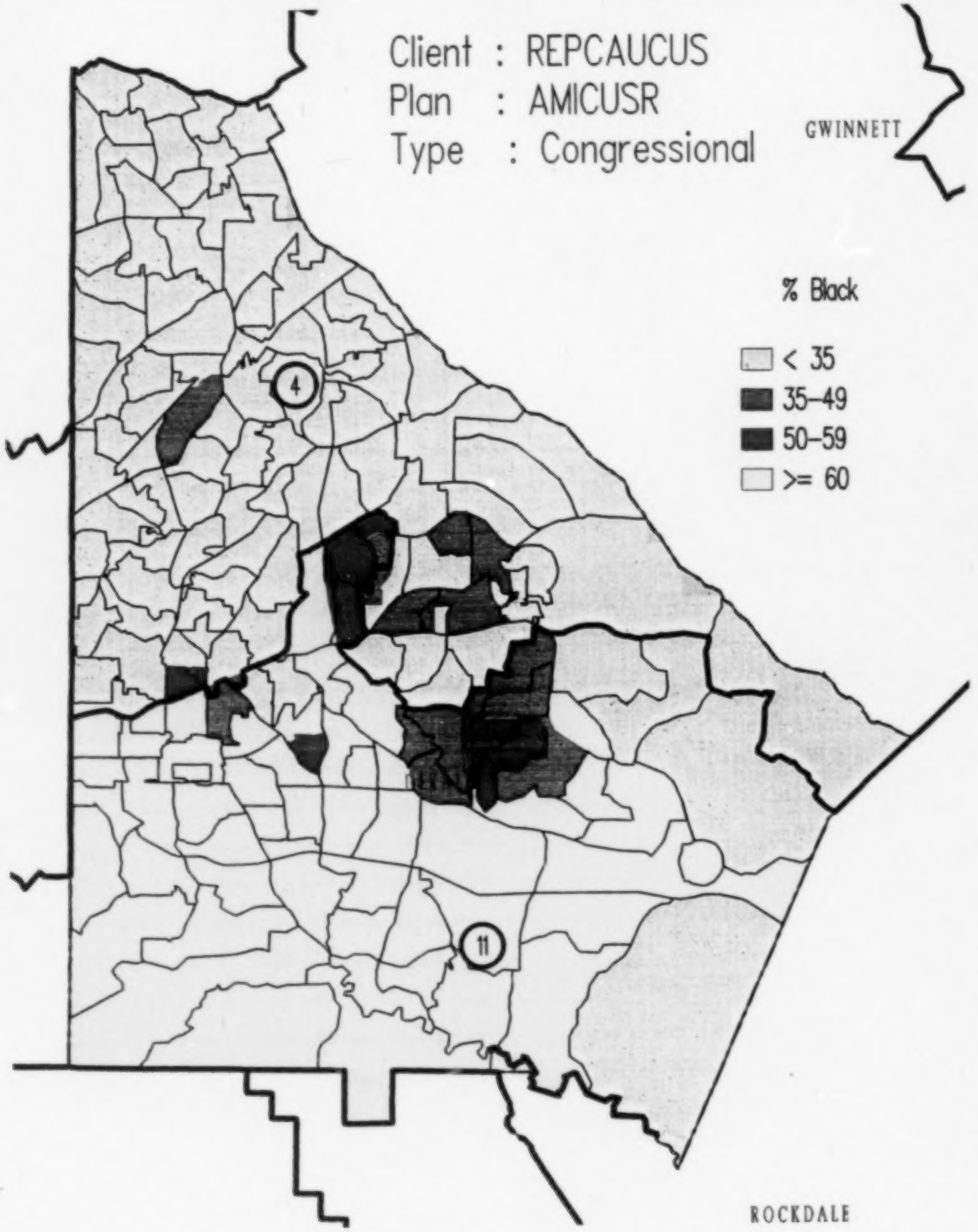
Room: 941 Time: 9:41 AM

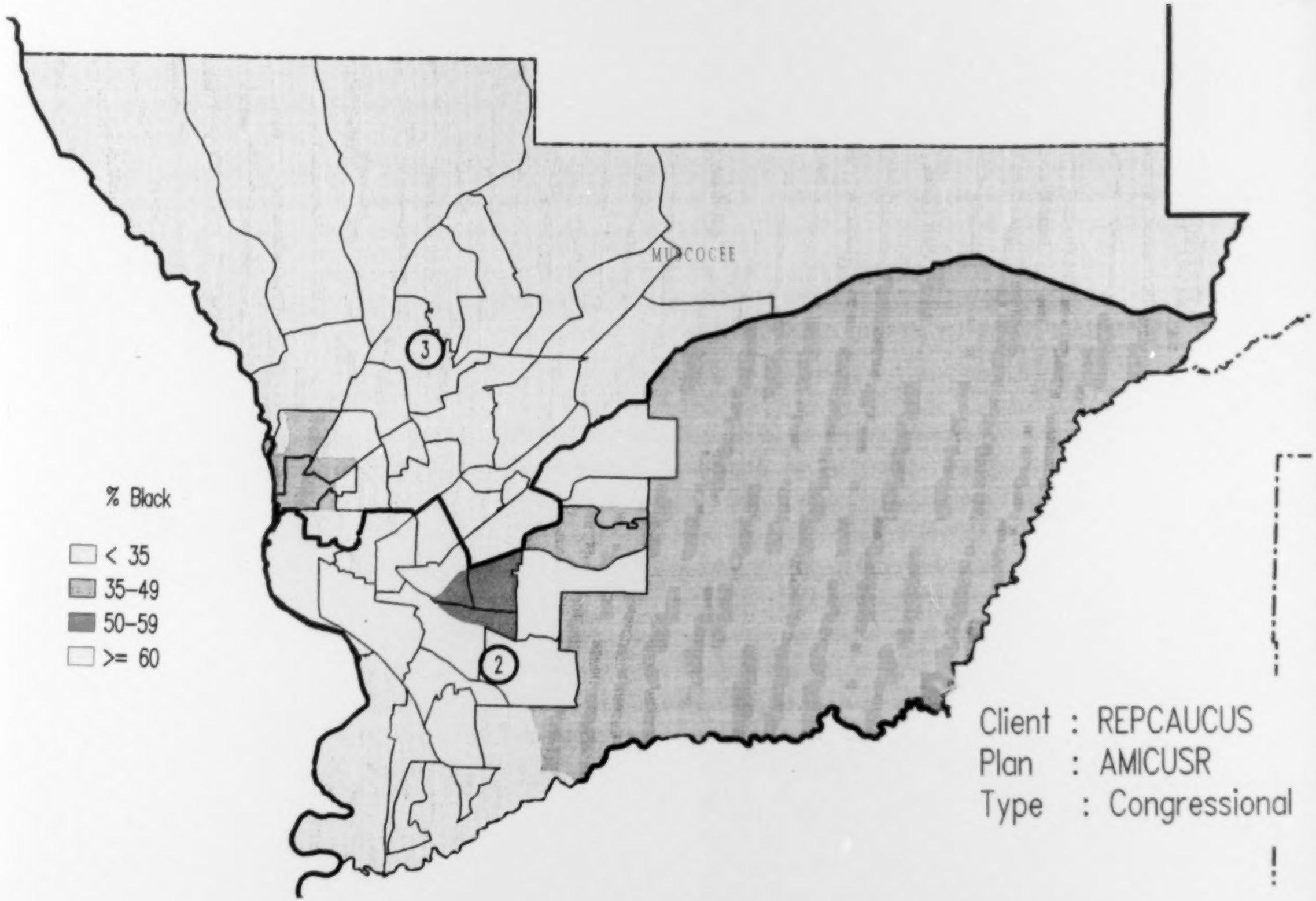
Plan: LIT16620124NEW4X Report: Remedy 4X. rep

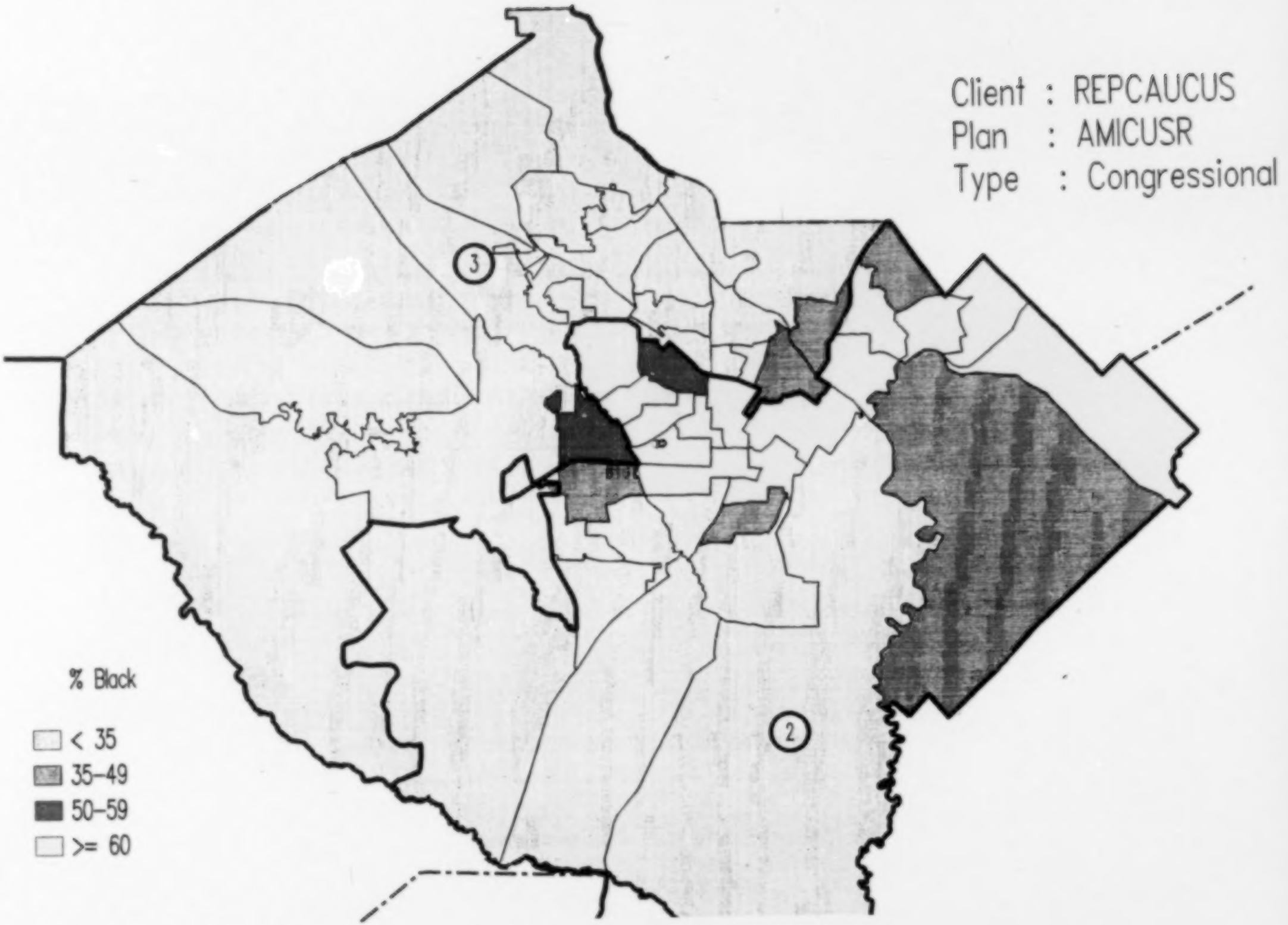
Population Summary Report Plaintiffs' Remedy 4X

Dist :	TOTAL	DEVIATION	DEV%	WHITE%	BLACK%
1 :	588541	-388	-0.07	67.58	30.55
2 :	587583	-1346	-0.23	59.54	39.21
3 :	589276	347	0.06	73.09	24.80
4 :	589277	348	0.06	55.02	40.36
5 :	590666	1737	0.29	39.57	58.01
6 :	589268	339	0.06	91.36	5.80
7 :	588429	-500	-0.08	85.15	13.70
8 :	587912	-1017	-0.17	67.92	31.07
9 :	589420	491	0.08	94.68	3.65
10 :	588495	-434	-0.07	85.48	12.69
11 :	589349	420	0.07	61.78	36.67

Total Population	:	6478216
Ideal Population	:	588929
Mean Deviation is	:	0
Mean Percent Deviation is	:	0
Largest Positive Deviation is	:	1737
Largest Negative Deviation is	:	-1346
Overall Range in Deviation is	:	3083
Overall Range in Deviation% is	:	0.52


Client : REPCAUCUS
Plan : AMICUSR
Type : Congressional
GWINNETT
% Black
< 35
35–49
50–59
>= 60
4
11
ROCKDALE


MUSCOGEE
3
2
% Black
< 35
35–49
50–59
>= 60
Client : REPCAUCUS
Plan : AMICUSR
Type : Congressional


Client : REPCAUCUS
Plan : AMICUSR
Type : Congressional
3
2
% Black
< 35
35–49
50–59
>= 60

DISTRICT 11 FROM FIRST CONGRESSIONAL PLAN PASSED BY GEORGIA LEGISLATURE IN 1991 (S.B. 2EX)

(NOTE: VAP = Voting Age Population)

District Number	Total Pop % Deviation	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
REMAINDER OF DISTRICT	158263 -73.13	70810 44.74	111964 70.75	45968 41.06
DEKALB PORTION	230592 -60.85	163176 70.76	163684 70.98	109727 67.04
RICHMOND PORTION	114910 -80.49	66539 57.91	81691 71.09	43744 53.55
BIBB PORTION	79588 -86.49	53179 66.82	57903 72.75	35635 61.54
Totals	583353	353704	415242	235074

Number of Districts : 11
Members Per District : 1

Ideal District Size : 588929
Average Deviation (%): 75.24
Deviation Range (%) : -86.49 to 0.00
Overall Deviation (%) : 86.49

(DATA SOURCE: 1990 US Census PL94-171 Population Counts)
(NOTE: Districts numbered > 200 are used as special)
(accumulators. They are not included in avg)
(or % range calculations.)

Supreme Court of the United States

No. 95-1460

UNITED STATES, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

APPEAL from the United States District Court for the Southern District of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with No. 95-1425 - *Lucious Abrams, Jr., G. L. Avery, Williams Gary Chambers, Sr., and Karen Watson* and a total of one hour is allotted for oral argument.

May 20, 1996

Supreme Court of the United States

No. 95-1425

LUCIOUS ABRAMS, JR., G. L. AVERY
WILLIAM GARY CHAMBERS, SR., AND KAREN WATSON,
APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

APPEAL from the United States District Court for the Southern District of Georgia.

The statement of jurisdiction in the case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with No. 95-1460 - *United States v. Davida Johnson, et. al.* and a total of one hour is allotted for oral argument.

May 20, 1996

Supreme Court, U.S.
FILED
JUL 19 1996
CLERK

(8) (8)

Nos. 95-1460 and 95-1425

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

LUCIOUS ABRAMS, ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS APPELLANT

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54 pp

QUESTIONS PRESENTED

1. Whether the district court's congressional districting plan for the State of Georgia contains a greater deviation from the constitutional one-person, one-vote requirement than is necessary or justifiable.

2. Whether the district court's congressional districting plan for the State of Georgia deprives African-Americans of an equal opportunity to participate in the electoral process and elect candidates of their choice, and thereby violates Section 2 of the Voting Rights Act.

3. Whether the district court's congressional districting plan for the State of Georgia departs from state districting policies to a greater extent than necessary to cure the constitutional violations in the State's plan, in contravention of this Court's decision in *Upham* v. *Seamon*, 456 U.S. 37 (1982).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the plaintiffs below were Pam Burke, Henry Zittrouer, George L. DeLoach, George Seaton, James Rhodes, Gary Heard, Daniel Morrel, and Donald Shirah. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of State of Georgia. Max Cleland has been succeeded as Secretary of State by Lewis Massey. Intervenor-defendants were Lucious Abrams, Jr., Rev. G.L. Avery, William Gary Chambers, Sr., and Karen Watson.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1460

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

No. 95-1425

LUCIOUS ABRAMS, ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS APPELLANT

OPINIONS BELOW

The remedial order and opinion of the three-judge district court (J.S. App. 1a-29a[1]) is reported at 922 F. Supp. 1556. The three-judge court's earlier opinion with regard to Georgia's Second Congressional District (J.S. App. 30a-38a) is reported at 922 F. Supp. 1552. This Court's prior opinion in this case is re-

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[1] "J.S. App." refers to the appendix to the United States' Jurisdictional Statement in No. 95-1460.

ported at 115 S. Ct. 2475. The three-judge court's original liability opinion is reported at 864 F. Supp. 1354.

JURISDICTION

The judgment of the three-judge district court was entered on December 13, 1995. The United States filed a notice of appeal on January 12, 1996 (J.S. App. 47a-48a). This Court noted probable jurisdiction on May 20, 1996. 116 S. Ct. 1823. The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following constitutional, statutory, and regulatory provisions involved are set forth in the appendix to this brief: Art. I, § 2, of the United States Constitution; Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973; Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c; and 28 C.F.R. 51.54.

STATEMENT

In *Miller* v. *Johnson*, 115 S. Ct. 2475, 2490 (1995), this Court held that the Eleventh District in Georgia's 1992 congressional redistricting plan violated the Equal Protection Clause because "[r]ace was * * * the predominant, overriding factor explaining the [Georgia] General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations," and because that use of race was not "narrowly tailored to achieve a compelling interest." On remand, the three-judge district court held that the Second District in Georgia's plan—also a majority-minority district—was similarly unconstitutional. After the legislature was unable to enact a new plan, the district court

devised its own remedial plan. This appeal seeks reversal of the district court's judgment on the ground that the plan it ordered into effect violates constitutional one-person, one-vote requirements, Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the requirement that a court imposing a redistricting plan depart as little as possible from the State's redistricting policies, see *Upham* v. *Seamon*, 456 U.S. 37 (1982).

1. The 1990 census entitled the State of Georgia to an additional—eleventh—congressional district. Prior to that census, African-Americans, although 27% of Georgia's population, constituted a majority of the voting age population (VAP) in only one of Georgia's ten congressional districts—the Fifth District, located in the Atlanta area. See *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983). In 1991 and early 1992, the Georgia legislature enacted two successive redistricting plans. Each of them contained two majority African-American districts: the Fifth District, in the Atlanta area, and the Eleventh District, extending eastward from the DeKalb County suburbs of Atlanta. The Department of Justice interposed objections to both plans under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

In 1992, the state legislature enacted a plan containing three congressional districts in which African-Americans constituted a VAP majority. See *Miller* v. *Johnson*, 115 S. Ct. 2475, 2482-2484 (1995). That plan received preclearance, but the Eleventh District was found unconstitutional by a three-judge district court. *Johnson* v. *Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994).

This Court affirmed. The Court held that the district court had correctly subjected the Eleventh District to strict scrutiny because race had been "the predominant, overriding factor" in the drawing of the Eleventh District. 115 S. Ct. at 2490. The Court found that the State's plan "subordinated traditional race-neutral districting principles * * * to racial considerations." *Id.* at 2488. The Court noted that the plan's extension of the Eleventh District to Savannah was occasioned entirely by the desire to place African-American population in the City of Macon (Bibb County) in the Second District, *id.* at 2489, and that many counties and precincts were split for the sole purpose of increasing the Eleventh District's black population, *ibid.*

Applying strict scrutiny, the Court concluded that the State's use of race in drawing the plan was not justified by the objective of complying with Section 5 of the Voting Rights Act. The Court held that there was "no reasonable basis to believe that Georgia's earlier enacted [two majority-minority district] plans violated § 5," because they were not retrogressive and because "[t]he State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference" of discriminatory purpose under Section 5. 115 S. Ct. at 2492.

2. On remand, the district court permitted the plaintiffs to add parties and amend their complaint to challenge the Second Congressional District (the other new majority-minority district that had been created by the State in 1992). J.S. App. 1a-2a. The district court refused, however, to allow any Georgia voters to intervene in defense of the Second District. On October 30, 1995, the district court held a hearing

on the constitutionality of the Second District. On December 1, 1995, the district court issued an order holding the Second District unconstitutional, for essentially the same reasons that this Court had held the Eleventh District unconstitutional. J.S. App. 30a-38a.

3. After this Court's remand order, the district court offered the legislature an opportunity to formulate a new districting plan, but the legislature was unable to do so. Each chamber of the state legislature passed a different plan and, on September 13, 1995, the legislature notified the court that it was unable to redraw the map. J.S. App. 2a.

4. In October, 1995, the district court issued two orders. The first (R. 325: Order of October 18, 1995) called upon the parties to submit remedial plans that corrected the faults of the unconstitutional plan while making the fewest changes in it. The second order asked the parties to file remedial plans "that comport[] with Georgia's historical districting principles, Constitutional requirements, and the Voting Rights Act." R. 329: Order of October 20, 1995. The second order requested the parties not to base their proposals on the plan that had been ruled unconstitutional in part by this Court, but rather upon the first plan Georgia had enacted in 1991—a plan containing two majority-minority districts.

The plans offered to the district court during the remand proceedings fell into two general categories. In one category were four plans submitted by the Abrams Intervenors, one submitted by Congressmen Lewis and Gingrich, and one passed by the State House. See R. 296; J.A. 190-199. Those plans each

contained at least two districts[2] with African-American VAP majorities: the Fifth, in the Atlanta area, and the Eleventh. In each plan, the Eleventh District had about a 50%-53% black VAP. In all but one, the Eleventh District was located in the same east-central part of Georgia as the Eleventh District in the State's three 1991 and 1992 plans, but with counties reunited and the extension to Savannah removed. Of this group of plans, the Abrams Plan A (J.A. 195) had the lowest overall population deviation[3] (0.29%[4]), while the plan passed by the state House (J.A. 191) had the highest overall deviation (1.92%).

In the second category were the plaintiffs' proposed plans and the plan that had been passed by the state Senate. R. 342; J.A. 200-201; R. 295. In each of them, only the Fifth District, which encompassed the City of Atlanta and some surrounding areas, had an African-American VAP majority. None of these plans contained another congressional district in which the African-American VAP was greater than

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[2] One of the plans, which was known as the Abrams Plan A, had three African-American majority VAP districts. See J.A. 195.

[3] We use the term "overall population deviation" to mean the difference, expressed as a percentage of the population of an ideally apportioned district (in this case, one with exactly one-eleventh of the State's population), between the populations of the district with the largest population and the district with the smallest population.

[4] When we reprinted the various maps and statistics for purposes of compiling the Joint Appendix, it became evident that a small part of District 10 was not contiguous with the rest of the district in Abrams Plan A, apparently as the result of a computer error. The record before the district court showed the overall deviation for the plan as thus constructed as 0.29%.

40%. The range of overall population deviations for those plans was between 0.74% in plaintiffs' remedy 1B (see R. 342 and attachment), and 1.84%, for the State Senate plan (see R. 295, at 3). After a hearing on October 31, the district court ordered plaintiffs to resubmit one of their plans with reduced overall population deviation. R. 363. The resulting plans—Remedy 4X and 4XR, see J.A. 202-203—had overall population deviations of 0.52%. The court called upon the parties to submit comments by November 22. R. 363.

On November 22, the United States submitted a brief (R. 369), accompanied by an "Illustrative Plan," arguing that the plaintiffs' proposed Remedies 4X and 4XR did not meet the requisite standards of population equality, made more changes than necessary to cure the constitutional violation, and violated the Voting Rights Act by including only one majority-minority district. The Illustrative Plan was intended to illustrate that a plan could be drawn with two compact majority-minority districts and minimal population deviations that adheres to Georgia's traditional policy choices. It splits only two counties outside the metropolitan Atlanta area. Its overall population deviation of 0.19% was the lowest overall population deviation of any plan before the district court. The plan includes two compact majority African-American districts—the Fifth and the Eleventh. A map of the Illustrative Plan and demographic data for the district appear at J.S. App. 44a-45a.[5]

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[5] The maps of the district court's plan, J.S. App. 42a, the Illustrative Plan, *id.* at 44a, and the first plan the State adopted after the 1990 census, *id.* at 46a, were reproduced on computers

5. On December 13, 1995, the three-judge district court adopted the plan from which this appeal is taken. The plan, a map of which appears at J.S. App. 41a, closely resembles the plan (Remedy 4X, reproduced at J.A. 202) that the plaintiffs submitted in response to the court's order following the October 31 hearing. It has an overall population deviation of 0.35%. It includes only one majority-minority district (the Fifth), which contains a 57% African-American VAP. J.S. App. 6a, 25a. See also *id.* at 43a (demographic data for court's plan). The court ordered the State to adhere to that plan "until the legislature convenes to change it * * * following the millennium census, or before." *Id.* at 28a-29a.

a. The district court recognized that, "[i]n fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan," because such a "minimum change plan acts as a surrogate for the

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at the Department of Justice so that the colors and legends on the maps would be uniform. Similarly, the following maps included in the Joint Appendix have been reproduced on Department of Justice computers, and for the same purpose: Congressional Redistricting Plan MSLSS, August 25, 1995 (Abrams Exhibit 37) (House Passed Plan) (J.A. 190); Congressional Redistricting Plan Amicus-R (Lewis/Gingrich) (Exhibit Amicus 1) (J.A. 192); Congressional Redistricting Plan ACLU1A (Abrams Exhibit 36) (Selwyn Carter's "least change" plan) (J.A. 198); Congressional Redistricting Plan SRC/ACLU Plan A (July 31, 1995) (Abrams A) (R. 296 and R. 319) (J.A. 194); Congressional Redistricting Plan SRC/ACLU Plan C (Abrams C) (R. 296) (J.A. 196); Congressional Redistricting Plan Plaintiffs' Remedy 4 (Plaintiffs' Exhibit 56) (J.A. 200); Congressional Redistricting Plan Plaintiffs' Remedy 4X (R. 367, Exhibit B) (submitted in response to District Court's Order of November 9, 1995) (J.A. 202).

intent of the state's legislative body." J.S. App. 2a-3a (citing *Upham* v. *Seamon*, 456 U.S. 37 (1982)). The court held, however, that "Georgia's current plan was tainted by unconstitutional [Department of Justice] interference," J.S. App. 4a, and that the court therefore "c[ould] not use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals." *Id.* at 5a. The court also stated that "any remedy even minimally disruptive to the current plan would necessarily have resulted in drastic changes" because the two districts that had been declared unconstitutional were "on opposite sides of the state," and "it is a virtual impossibility to change less than we have." *Id.* at 6a.

With respect to the goal of population equality, the court noted that "federal courts are held to stricter standards than legislatures," and that the court therefore was "particularly constrained to create a remedy with the lowest population deviation practicable." J.S. App. 7a. The court stated that only the Illustrative Plan submitted by the Department of Justice had a lower overall deviation than the plan the court adopted, *id.* at 8a-9a & n.4,[6] but the court rejected that plan because it "split numerous counties outside of the metropolitan Atlanta area, apparently for racial reasons." *Id.* at 8a n.4. The Illustrative Plan in fact split only two counties outside the Atlanta area. See *id.* at 44a (map).

The court conceded that "there is some deviation resulting from our adherence to Georgia's traditional

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[6] This statement was incorrect; in addition to the Illustrative Plan, the record indicated that two other plans submitted by the Abrams Intervenors had lower overall deviations (0.29% and 0.34%) than the court's plan. See J.A. 195; R. 296 and 319.

districting principles and unique factors." J.S. App. 8a. The court identified those factors as the State's "strong historical preference for not splitting counties outside of the metropolitan Atlanta area," *ibid.*; see also *id.* at 15a-16a, and the "maintenance of district cores and communities of interest," *id.* at 10a; see also *id.* at 17a-18a. The court acknowledged that "Georgia has historically sought to draw district lines so incumbents remain in their districts in a new plan and to avoid placing two incumbents in the same district." *Id.* at 18a; see also *id.* at 14a n.10. The court stated, however, that, although it "considered this factor," it "subordinated it to the other considerations" because "it is inherently more political than factors such as communities of interest and compactness." *Id.* at 18a. Accordingly, the court's plan placed the residences of two incumbents—the African-American Members of Congress from the former Eleventh and Second Districts—in districts containing the residences of other incumbents, and it moved the residence of the incumbent from the former Eighth District into the Second District. *Id.* at 21a.

b. The court also discussed the application of the Voting Rights Act to its plan, noting that "[d]uring the remedy phase of the hearing, a significant portion of the argument centered on whether the Court's remedy would be required by Section 2 to contain two majority-minority districts." J.S. App. 19a. In order to find that a districting plan violates Section 2, a court must conclude that the minority population is sufficiently compact and numerous to form a district, that the minority group is politically cohesive, and that whites voting as a bloc usually defeat the candidate of choice of minority voters. See *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986). (This Court

referred to the latter two factors collectively as "legally significant racially polarized voting." See *id.* at 56.)

With respect to compactness and numerosity, the court noted that "[i]f Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so." J.S. App. 21a n.16. Regarding polarization, the court repeated the assertion it had made in its earlier decision in this case that, "while some degree of vote polarization exists, it is 'not in alarming quantities.'" *Id.* at 23a (quoting 864 F. Supp. at 1390). Nonetheless, the court held that Section 2 "does require maintenance of the Fifth District as a majority-minority district," J.S. App. 24a-25a, and that "maintaining the percentage of black registered voters [in the Fifth District] as close to fifty-five percent as possible was necessary, in our view, to avoid dilution of the Fifth District minorities' rights." *Id.* at 25a-26a. The court concluded, however, that Section 2 does not require a second majority-minority district in Georgia "due primarily to the geographic dispersion of [Georgia's] minority population and lack of any significant vote polarization." *Id.* at 20a.

c. Judge Edmondson noted his dissent, but did not file an opinion. J.S. App. 29a.

SUMMARY OF ARGUMENT

The United States seeks reversal of the district court's order imposing upon the State of Georgia a congressional redistricting plan that reduces from three to one the number of majority-minority districts. The district court's plan, which purports to

remedy the constitutional defects found in the 1992 plan, violates established principles respecting court-ordered redistricting and denies African-American citizens equal opportunity to participate in the political process and elect representatives of their choice to Congress.

A. The court's redistricting plan violates the one-person, one-vote requirement of Article I, Section 2, of the Constitution. Alternative plans demonstrate that it is possible to achieve a significantly smaller overall deviation from ideal district population size than is present in the court's plan.

B. The district court's plan violates Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. Section 2, properly applied, requires creation of a majority-minority district in east-central Georgia. Alternative plans show that the black population of that area is sufficiently compact to satisfy the first prong of a Section 2 case under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). The district court's own findings and the record below amply demonstrate that the African-American voters in this area vote cohesively, and their candidates of choice are generally defeated by white voters voting as a bloc. Georgia's history of discrimination and the totality of circumstances, moreover, clearly show that failure to draw a majority-minority congressional district in this area violates Section 2.

C. The district court's congressional districting plan violates the rule set forth in *Upham* v. *Seamon*, 456 U.S. 37 (1982), by making more changes in the existing plan than necessary to correct that plan's constitutional defects. The court's plan disregards the State's policy of having at least two majority-minority districts—a policy embodied in all three

districting plans enacted by the Georgia legislature since the 1990 census. The Illustrative Plan, on the other hand, while splitting only two counties outside of the Atlanta area, contains two majority-minority districts and closely resembles the first plan passed by the legislature in 1991, which provides a useful indication of state policies prior to the Section 5 preclearance process. It also maintains the cores of the districts as they existed in 1992 without incorporating the unconstitutional features of that plan.

D. The Abrams appellants have argued in addition that the district court's plan is unnecessarily retrogressive, in violation of the substantive standards of Section 5. We agree that it is. We note, however, that in the present posture of this case, the question whether the district court's plan is retrogressive turns on the same factors as the question whether it violates Section 2 and the principles of *Upham* v. *Seamon*.

ARGUMENT

A. THE DISTRICT COURT'S PLAN DEVIATES UNJUSTIFIABLY FROM THE PRINCIPLE OF POPULATION EQUALITY

The district court clearly erred in adopting a plan that deviates from the principle of population equality more than is necessary or justifiable. Article I of the Constitution requires that congressional districts achieve population equality "as nearly as is practicable." *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964). This requirement is close to an absolute standard. *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 527-528 (1969). When a state legislature draws congressional districts, "the command of Art. I, § 2, as regards the National Legislature outweighs the local inter-

ests that a State may deem relevant in apportioning districts for [state legislative] representatives." *Karcher* v. *Daggett*, 462 U.S. 725, 733 (1983).

Where a state legislature draws congressional districts, a minimal deviation from absolute population equality may be justified by consistently applied state legislative policies, such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Karcher*, 462 U.S. at 740. But, as the district court correctly noted, J.S. App. 7a, the standard for court-ordered districting plans is a stricter one. *Connor* v. *Finch*, 431 U.S. 407, 413-414 (1977); *Chapman* v. *Meier*, 420 U.S. 1, 26-27 (1975). Because redistricting is "'primarily a matter for legislative consideration and determination,' * * * a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." *Connor*, 431 U.S. at 414-415 (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964)). Courts, on the other hand, have no mandate "to compromise sometimes conflicting state apportionment policies in the people's name." *Connor*, 431 U.S. at 415.

1. The district court's plan contravenes the principle of population equality. The largest population deviation in the court's plan is 0.35%, between the Third District (which deviates by +0.12% from absolute population equality) and the Second District (which deviates by -0.23%). J.S. App. 43a. In contrast, the largest population deviation in the Hlustrative Plan, submitted by the Department of Justice, is 0.19%—between the Tenth District (which deviates by +0.09%) and the Eleventh District (which deviates

by -0.10%). *Id.* at 45a. That difference in deviations is sufficient to have required the district court to adopt the Illustrative Plan (or some other plan with an equal or smaller deviation), unless there is a compelling justification for its failure to do so.

2. In a footnote, the court justified its decision to adopt a plan with a greater population deviation than that in the Illustrative Plan on the ground that the Illustrative Plan "split numerous counties outside of the metropolitan Atlanta area, apparently for racial reasons." J.S. App. 8a n.4.[7] That justification is clearly insufficient. The Illustrative Plan splits two counties outside the Atlanta area; both divisions are explicable on non-racial grounds and are consistent with traditional districting principles.

The Illustrative Plan splits Muscogee County in southwestern Georgia, in which part of Fort Benning is located, between the Second and Third Districts. In the court's plan, those districts are the two with the highest deviations (-0.23% and +0.12%), adding up to a total deviation of 0.35%. By splitting Muscogee County, the Illustrative Plan dramatically lowered

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[7] In that footnote, the court also stated that "[w]hether the DOJ should be involved in this, the map-generation phase of the redistricting process is questionable," apparently because "[n]ormally, Georgia would originate a plan for DOJ preclearance under Section 5 [of the Voting Rights Act]." J.S. App. 8a n.4. There is no reason why the Department of Justice should not be permitted to introduce plans in a redistricting case in order to provide bases for analysis under Section 2 and constitutional one-person, one-vote requirements. Submission of such a plan is ordinarily essential in order to make out the preconditions for a Section 2 case under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Despite its doubts, the district court accepted the submission of the Illustrative Plan and considered it on its merits.

the deviation from population equality of the two districts; the deviation of the two districts in the Illustrative Plan is, respectively, 0.01% and 0.02%. In splitting Muscogee County, the Illustrative Plan also keeps all of Fort Benning—which is located in Muscogee and Chattahoochee Counties—in the Second District. The State's first post-1990 plan also kept Fort Benning in one district by splitting a county (in that plan, Chattahoochee County). See J.S. App. 46a (map). The court's plan keeps Muscogee and Chattahoochee Counties intact, but it splits Fort Benning between the Second and Third Districts. The Illustrative Plan is thus more consistent with the State's own preferences than the court's plan, results in a much smaller population deviation, and is explicable on nonracial grounds (the desire to keep Fort Benning in a single district).

The Illustrative Plan also splits Bibb County, in the center of the State, among the Third, Eighth, and Eleventh Districts. Under the court's plan, the deviation in those districts is +0.12%, -0.17%, and +0.08%, respectively. J.S. App. 43a. Under the Illustrative Plan, the deviation in those three districts is +0.03%, +0.05%, and -0.10%. *Id.* at 45a. The Illustrative Plan thus reduces the deviation substantially in two of the districts and increases it only slightly in the third.[8] Each of Georgia's first two post-1990 plans

[8] The population deviation of 0.19% between the Tenth and Eleventh Districts in the Illustrative Plan could be decreased with some minor changes in the Atlanta area or in Bibb County. In the course of the proceedings below, the United States endorsed plans that contained two majority-minority districts having overall population deviations larger than that in the court's plan. For example, we told the court in October, 1995, that two such plans appeared to "comply with the United States Constitution and the Voting Rights Act," United States' Brief on Remedy, R. 348, at 1-2, and we again endorsed those plans for their balancing of race and traditional districting criteria at the October 30-31 hearing. Tr. 414, 421-422. There was testimony, however, that, with minor changes, the population deviations in those plans could be made much smaller. J.A. 164 (testimony of Selwyn Carter).

also split Bibb County, placing most of the City of Macon in a majority-minority district. See *id.* at 46a (map of first enacted post-1990 plan)). The Illustrative Plan thus follows state policies in this respect as well.[9]

Keeping county boundaries intact cannot be an absolute goal in the redistricting process. See, *e.g.*, *Kirkpatrick*, 394 U.S. at 533-534 ("[W]e do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries."); *Wells* v. *Rockefeller*, 394 U.S. 542, 546 (1969) (same); *White* v. *Weiser*, 412 U.S. 783, 791 (1973) (same).[10] The sanctity of county boundaries is

[9] The Illustrative Plan does not attempt to add African-American population to the Second District, as did the unconstitutional plan, by placing the City of Macon in the Second District. The Illustrative Plan places most of Macon in the Eleventh District, consistent with the district court's order to use the first enacted plan (1991) as a model. The Illustrative Plan does not place any of the remainder of Macon—or of Bibb County—in the Second District.

[10] *Connor* v. *Finch*, *supra*, dealt with court-ordered state legislative plans, not congressional redistricting. The district court incorrectly relied on *Connor*, see J.S. App. 8a, to justify rigid adherence to the asserted state policy against splitting counties outside the Atlanta area.

particularly questionable in Georgia. The three-judge court took judicial notice at an earlier stage of this case that "until 1962 the county unit system was used to undermine the voting strength of counties with large black populations." J.S. App. 40a. The county unit system was also employed to avoid one-person, one-vote requirements. See also *Wesberry* v. *Sanders*, *supra*. The State of Georgia has split counties outside the Atlanta area for purposes of congressional redistricting in the past; in the 1970s, Whitfield County was divided in a highly irregular pattern between two congressional districts. See 94-631 J.A. 79. The State does not "consistently appl[y]," *Karcher*, 462 U.S. at 740, a policy of keeping counties intact throughout the State; as the three-judge court itself found, Georgia's "preference" against splitting counties has not applied at all to the Atlanta area since the county unit system was struck down. J.S. App. 8a-10a. Both the 1972 and 1982 districting plans split counties in the Atlanta area, and the three-judge court's own plan splits six counties in the immediate area of Atlanta. *Id.* at 15a.[11]

3. The Illustrative Plan demonstrates that a remedy is feasible that has a lower overall population deviation than the court's plan and that otherwise comports with the law. Appellees have advanced two bases for rejecting the Illustrative Plan. Neither of them is persuasive.

a. The Johnson Appellees have argued that the Illustrative Plan "has no probative value as a one

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[11] Although the court stated that it split those counties "for population density reasons," J.S. App. 15a, it later retreated to the claim that "it would be impossible to avoid splitting *any* counties," *id.* at 18a n.12 (emphasis added).

person, one vote benchmark * * * because the DOJ did not respect Georgia's voting precincts in drawing its plan." Johnson Mot. to Aff. 24. That contention is incorrect. The Illustrative Plan was built on census tracts, not precincts, because at the time it was drawn, the United States did not have data on Georgia's precincts in its mapping program. But the use of census tracts does not affect the utility of the Illustrative Plan in demonstrating that a plan with a lower overall population deviation and that otherwise comports with the law was feasible.

Since the Illustrative Plan as a whole splits only two counties outside the Atlanta area and since precinct lines follow county lines, it is doubtful that the Plan splits an inordinate number of precincts. In addition, the size of a census tract is typically of the same order of magnitude as a precinct in Georgia, and a census tract is typically drawn based on considerations similar to those used in drawing precinct lines.[12]

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[12] "Census tracts usually have between 2,500 and 8,000 persons and, when first delineated, are designed to be homogeneous with respect to population characteristics, economic status, and living conditions." U.S. Department of Commerce, Bureau of the Census, *1990 Census of Population: Social and Economic Characteristics, Georgia* A-5 (1993). A precinct in Georgia is generally to include less than 2,000 electors (which means more than 2,000 people), Ga. Code Ann. § 21-2-263 (Michie Supp. 1995). Voting precincts are also to follow the same kinds of landmarks that can be expected to form the boundaries of census tracts, such as "[v]isible features which are readily distinguishable upon the ground (such as streets, railroad tracks, streams, lakes, and ridges) and which are indicated upon official * * * maps, *current census maps*, city or county planning maps, * * * or any combination of such maps." Ga. Code Ann. § 21-2-261.1(a)(1) (Michie Supp. 1995) (emphasis added).

Therefore, insofar as the Illustrative Plan may split more precincts than does the court's plan in those areas where counties are divided,[13] the Plan could certainly be refined to eliminate those precinct splits. Finally, although precinct lines have some importance in the redistricting process, they are not sacrosanct. They are largely an administrative measure for dividing voters among different polling places and they are subject to change under Georgia law "to suit the convenience of the electors and to promote the public interests." Ga. Code Ann. § 21-3-161(a) (Michie 1993). The fact that the Illustrative Plan was designed using census tracts rather than voting precincts therefore does not undermine that plan's probative value.

b. Contrary to the State's suggestion, the excessive deviations in the court's plan (as compared to the Illustrative Plan) are not justified because "there have been substantial population changes over the past six years throughout Georgia" and "[e]ven exact mathematical precision in a reapportionment plan based on the 1990 census necessarily must have significant current deviations *today*." Georgia Mot. to Aff. 18. This Court rejected precisely that argument in *Karcher*, 462 U.S. at 732. Justice White's dissenting opinion in that case argued that the fact that "[d]istrict populations are constantly changing" could justify a legislature in adopting a plan with a larger-than-necessary overall population deviation. *Id.* at 771. The Court rejected that argument on the ground that "problems with the data at hand apply equally to any population-based standard" and that "[a]s between

[13] The district court noted that its own plan split precincts in some areas. J.S. App. 9a n.6.

two standards—equality or something less than equality—only the former reflects the aspirations of Art. I, § 2." *Id.* at 732. That principle applies even more clearly to this case, since court-ordered districting is held to a stricter standard than the legislative districting at issue in *Karcher*. See *Connor*, 431 U.S. at 413-414; *Chapman*, 420 U.S. at 26-27.

B. THE DISTRICT COURT'S PLAN VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT

The district court's plan violates Section 2 of the Voting Rights Act because the "totality of circumstances" shows that the creation of a majority-minority district in east-central Georgia is necessary to produce a congressional redistricting plan that does not dilute black voting strength. The district court's plan fails to create such a district.

The basic elements of a Section 2 case, as set forth in *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), are present here. The Illustrative Plan demonstrates that the African-American population in Georgia is sufficiently large and compact—employing the State's own traditional districting criteria—to form a majority-minority district located in the east-central area of the State. African-Americans form a politically cohesive group in that area, and there is a pattern of racially polarized bloc voting such that whites voting as a bloc usually can defeat the candidate preferred by the African-American voters. Moreover, the totality of the circumstances—including a history of discrimination against African-Americans and the fact that the court's plan has only one majority-black district out of eleven (9%) while African-Americans constitute 27% of Georgia's population—demonstrates that African-Americans

will not have an equal opportunity to participate in the electoral process and to elect candidates of their choice under the district court's plan. We do not contend that a majority-minority district must be drawn wherever it is possible to do so. The district court's failure to draw such a district in this case, however, violated the substantive standards of Section 2.

1. *Compactness/Numerosity.* According to the district court, a second majority-minority district cannot be drawn in Georgia "due primarily to the geographic dispersion of its minority population." J.S. App. 20a. That is clearly incorrect.[14]

The African-American population in east-central Georgia is sufficiently large to create a second district. The Eleventh District in the Illustrative Plan is located in that area. Its population is 54.60% African-American, and its VAP is 51.04% African-American. The district has a population deviation of only 0.10%. See J.S. App. 45a.

The Eleventh District in the Illustrative Plan is also compact, contiguous, and its boundaries are regular. See J.S. App. 44a (map). It clearly comports with the State's traditional districting practices, as identified by the district court. Compare *Jeffers* v. *Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989), aff'd mem., 498 U.S. 1019 (1991); *Houston* v. *Lafayette County*, 56 F.3d 606 (5th Cir. 1995).

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[14] The district court made the same finding in its earlier decision in this case. See 864 F. Supp. at 1390. That finding was not affirmed on appeal because this Court had no occasion to consider whether Section 2 required the creation of two majority African-American districts in Georgia.

The district court stated that maintaining counties intact outside the Atlanta area was a traditional practice in Georgia. See J.S. App. 4a-15a; but see pp. 17-18, *supra*. The Illustrative Plan shows that a majority-minority district that respects that principle can be drawn in east-central Georgia. The Eleventh District in the Illustrative Plan divides only one county outside the Atlanta area, and the Illustrative Plan as a whole divides only one additional county outside the Atlanta area. See pp. 15-17, *supra*.

While the district court focused on the splitting of counties outside the Atlanta area, the appellees have suggested that the Illustrative Plan can be faulted for splitting DeKalb County, which is in the Atlanta area. Johnson Mot. to Aff. 18. But as indicated above, Georgia's "preference" against splitting counties has not applied to that area since the county unit system was struck down. J.S. App. 8a-10a. The district court's own plan divides DeKalb County, although in a different way from the Illustrative Plan. See *id.* at 15a-16a. The divisions that the Illustrative Plan makes in DeKalb County are at least as regular as the divisions made in the other Atlanta-area counties in the court's plan, compare *id.* at 44a (Illustrative Plan) with *id.* at 41a (court's plan), and (unlike the divisions in the court's plan) they closely resemble the divisions in DeKalb County that the State itself made in its first post-1990 plan, compare *id.* at 44a (Illustrative Plan) with *id.* at 46a (State's first post-1990 plan). As the district court stated, "the Georgia legislature has already made the political decision to split DeKalb for population density reasons, first in 1982, and again in each of the three plans presented to the DOJ for preclearance in 1992." *Id.* at 16a. The

division of DeKalb County thus does not cast any doubt on the compactness of the Eleventh District in the Illustrative Plan or on that district's consistency with traditional state districting principles.[15]

The district court also identified maintaining the cores of existing districts and keeping the State's four "corner districts" intact as traditional state practices. J.S. App. 16a-17a, 17a-18a. The Illustrative Plan recognizes the cores of the existing districts and maintains the same three corner districts as does the court's plan. See *id.* at 44a (map).[16]

The Eleventh District in the Illustrative Plan thus follows Georgia's traditional districting criteria far better than does the district court's plan. Moreover,

[15] The district court correctly noted that, although its own plan splits precincts in some places, J.S. App. 9a n.6, Georgia generally seeks to avoid splitting precincts, *id.* at 9a. As we have described, the Illustrative Plan was built on census tracts, not precincts, because at the time it was drawn the United States did not have data on Georgia's precincts in its mapping program. Nonetheless, for the reasons given above, see pp. 19-20, *supra*, it is doubtful that the Illustrative Plan as drawn splits an inordinate number of precincts, and it could certainly be redrawn based on precincts instead of census tracts.

[16] The district court observed that its plan "maintains ninety-five counties (totally or partially) in the same districts as they were located in the 1982 plan—significant given the addition of the Eleventh District." J.S. App. 10a. However, the Illustrative Plan fares better under the same measure; it maintains 101 counties totally or partially within the same district as in the 1982 plan. Similarly, when compared to the plan the Georgia General Assembly first passed in 1991—prior to any objection from the United States Attorney General—the Illustrative Plan maintains 138 of Georgia's 159 counties totally or partially in the same district while the district court's plan keeps only 123 counties in the same district. Compare 94-929 J.A. 80 with J.S. App. 44a (map).

it does not suffer from the deficiencies of the district that this Court found unconstitutional in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995). The Illustrative Plan's Eleventh District does not incorporate the Athens-Augusta strip that the district court found was "historically" located in the Tenth District and which was partially located in the district that this Court found unconstitutional in *Miller*. See J.S. App. 14a. Nor does the Eleventh District in the Illustrative Plan contain any part of the southeastern coastal area, as did the district that this Court found unconstitutional in *Miller*. See *id.* at 19a. As the Illustrative Plan therefore shows, the African-American population in DeKalb County and central Georgia is "sufficiently large and geographically compact to constitute a majority" in a second congressional district, *Gingles*, 478 U.S. at 48, without subordinating "Georgia's traditional districting policies," "constitutional norms," or "common sense," J.S. App. 21a.

2. *Racially Polarized Voting.* The evidence in the record in this case established the existence of legally significant racially polarized voting. The district court at one point referred to what it termed the "lack of any significant vote polarization." J.S. App. 20a. The court also stated that "some degree of [racial] vote polarization [in Georgia] exists" but "not in alarming quantities," and that "[t]he second and third *Gingles* preconditions therefore would not be met in a Section 2 challenge to the [court's] remedy." *Id.* at 23a (quoting 864 F. Supp. at 1390). To the extent those statements are read as factual findings that racially polarized voting in Georgia and, in particular, in the east-central portion of the State,

does not satisfy the second and third *Gingles* preconditions, they are clearly erroneous.

The district court appeared to base its statements regarding racially polarized voting on the findings it made at the earlier stage of this case. At that time, the court found that 22% to 38% of white people in the area of the 1992 Eleventh District (which substantially overlaps the area of the Eleventh District in the Illustrative Plan) would vote for African-American candidates, while 20% to 23% of African-Americans in the area would vote for white candidates. 864 F. Supp. at 1390.

Those findings, which substantially overstate the degree of white crossover voting,[17] are nevertheless sufficient to demonstrate the existence of legally significant racially polarized voting, especially in the area in which the Illustrative Plan's Eleventh

[17] Experts for the United States and plaintiffs found that white crossover voting ranged from 0% to 26%, and that black crossover voting ranged from 3% to 11% in the most relevant elections. J.A. 54-61, 69-70, 72. The court's higher crossover figures included consideration of judicial elections involving appointed black incumbents and elections in which there were multiple black candidates and a white candidate. Both kinds of elections are substantially less probative of racially polarized voting than elections between one black and one white candidate. See J.A. 60-61. See also *Gingles*, 478 U.S. at 57; *Collins* v. *City of Norfolk*, 883 F.2d 1232, 1243 (4th Cir. 1989), cert. denied, 498 U.S. 938 (1990). Indeed, the plaintiffs' expert, Dr. Weber, testified that judicial elections do not provide a good indication of voting patterns in congressional elections (J.A. 88) and that, if the judicial incumbent elections were removed from his own calculation, the white crossover vote would drop to 26.6% (J.A. 93). If the elections involving multiple black candidates were removed, he testified that the white crossover calculation would drop to 17%. J.A. 94.

District is located. The court's plan contains three districts—the Fourth, the Tenth, and the Eleventh—that each contain parts of the area covered by the Eleventh District in the Illustrative Plan. Of those three districts, the Tenth District has the largest African-American VAP—approximately 34%. Calculating white crossover voting at 30% and black crossover voting at 22%—the midpoints of the ranges found by the district court—a black-preferred candidate would likely be foreclosed from winning election in the court's Tenth District.[18] The same result would follow even more clearly in the court's Fourth and Eleventh districts, which have African-American VAPs of 33% and 11%, respectively. Voting polarization will thus prevent African-American voters in this area of the State from electing candidates of choice under the district court's plan.

[18] Black political cohesion is the inverse of black crossover voting. Under the assumption stated in the text of 22% black crossover voting, black political cohesion is 78% (100% - 22%). The vote for the minority-preferred candidate can be derived by multiplying the black VAP (34%) by black political cohesion (78%), and then adding the white VAP (66%) multiplied by the percentage of white crossover voting (30%). If crossover voting were at the midpoints of the ranges found by the district court, and if turnout rates for black and white voters were identical, the black-preferred candidate would receive 46% of the vote (and the white-preferred candidate therefore would receive 54%) in the court's Tenth District. If black crossover voting remained at approximately 22%, the white crossover vote would have to be approximately 36%—or at the very top of the range found by the district court—in order for a black-preferred candidate to win. If the consistently lower black turnout rates found by the district court are factored in, see 864 F. Supp. at 1392, the white crossover vote would have to be still higher for a minority preferred candidate to win.

The record below shows, moreover, that racial polarization in Georgia generally, and in the counties that were encompassed by the 1992 Eleventh District, is substantially more serious than the district court acknowledged. At trial, the parties stipulated to the facts that, with one exception, all of the African-American state legislators in Georgia were elected in districts that were at least majority African-American and that all but one of the 181 majority-white state legislative districts were represented by white legislators. See J.A. 116. The parties also stipulated that in Putnam, Greene, and Twiggs Counties—all of which are entirely located within the Eleventh District in the Illustrative Plan—civil rights litigation had resulted either in judicial findings of racially polarized voting or in changes in the challenged electoral system, or both. J.A. 123-125. Those facts support the conclusion that racially polarized voting results in the usual defeat of the minority-preferred candidate in majority-white election districts.

The expert testimony reached the same conclusion. Studying voting patterns in the precincts contained in the 1992 Eleventh District, the United States' expert, Dr. Lichtman, found that white crossover voting ranged from 0% to 26%. See note 17, *supra*. The plaintiffs' expert, Dr. Weber, essentially corroborated the results found by Dr. Lichtman with respect to the levels of polarization in the area of the Eleventh District. J.A. 99-115. In each instance, however, he found the results to be lacking in significance because, despite the polarization, the African-American candidates won within the borders of the 60% VAP African-American 1992 Eleventh District. J.A. 100-106. Far from casting doubt on the degree of

racially polarized voting, his testimony supported the showing that must be made to establish a Section 2 claim: that candidates of choice of African-Americans in the area of the 1992 Eleventh District can win majorities only if African-Americans form a majority of the constituency.

The district court's apparent findings of a lack of significant racial polarization also directly conflict with its Section 2 findings regarding the Atlanta area. The court found that "Section 2 * * * does require maintenance of the Fifth [Atlanta] District as a majority-minority district." J.S. App. 24a-25a. Indeed, the court found that polarization there was sufficiently serious that "maintaining the percentage of black registered voters as close to fifty-five percent as possible was necessary, in our view, to avoid dilution of the Fifth District minorities' rights." *Id.* at 25a-26a.

Those findings were based exclusively on the analysis prepared by Dr. Katz, the State's expert, at the original trial. J.S. App. 25a; see also 864 F. Supp. at 1390, 1391-1392. Dr. Katz analyzed a large group of Georgia election results and determined the racial composition of the registered electorate in each case. From those data, he calculated the probability of a black candidate winning an election in Georgia as a function of the percentage of blacks in the relevant electorate. J.A. 11-29, 33-37. He concluded that the probability of a black candidate winning an election in Georgia does not go above 50% until the percentage of registered voters who are black reaches approximately 50%. J.A. 28-29, 37.

Dr. Katz's study corroborates the conclusion that African-Americans can win elections in Georgia only when they are in the majority in the constituency.

Moreover, as the district court acknowledged, J.S. App. 26a n.18, the study is based on statewide data.[19] The study contained no evidence that polarization might differ in the areas of the Fifth and Eleventh Districts. Thus, if—as the district court believed—the study demonstrates that there is legally significant racially polarized voting in the area of the Fifth District, it would also demonstrate that there is similar racially polarized voting in the east-central area of the State, where the Illustrative Plan's Eleventh District is located. The court's contrary conclusions with regard to the two areas are inexplicably inconsistent.

3. *Totality Of Circumstances.* All the other factors that contribute to a "totality of circumstances" analysis establish that the district court's failure to draw a second majority-minority district in east-central Georgia violates Section 2. The district court's finding that Section 2 requires creation of a majority-minority district in the Atlanta area confirms that conclusion.

The history of racial discrimination in voting in Georgia has been spelled out in prior decisions, and the district court took judicial notice of that history

[19] It is doubtful that exclusive reliance on such statewide figures would be appropriate in an area-specific Section 2 challenge, see *Gingles*, 478 U.S. at 59 n.28, and, in any event, Dr. Katz's study does not directly address the question whether legally significant racially polarized voting exists, since it does not make "discrete inquiries into minority and white voting practices," *id.* at 56. But that does not deprive Dr. Katz's figures of their value in corroborating the consistent pattern of racially polarized voting in specific areas of the State shown by the evidence presented by Drs. Lichtman and Weber.

in its initial opinion in this litigation. See J.S. App. 39a-40a. From the time of Georgia's first constitution, which barred blacks from voting as a matter of law, Georgia has employed a variety of devices to dilute black voting strength. For that purpose, the State has employed literacy tests, white primaries, and the county unit system. The State has also used districting as a way of discriminating against African-American citizens. *Ibid.* From Reconstruction until the 1980s, black voters were not in the majority in any of the State's congressional districts. In 1982, the District Court for the District of Columbia found that the State of Georgia had acted with a discriminatory purpose in adopting a congressional redistricting plan that failed to include a district in the Atlanta area whose registered voters were majority African-American. See *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).

At the original trial, the parties stipulated to Georgia's history of past discrimination. See J.A. 117-123, 125-133. Among the consequences of that history are continuing and significant socioeconomic disparities between African-Americans and white persons in Georgia. See J.A. 133-135. Those differences result in African-Americans having a smaller economic base on which to draw to mount political campaigns. In addition, the evidence showed that African-Americans have lower registration and turnout rates than whites. See J.A. 77-78. The political handicaps suffered by blacks are aggravated by the large geographical area covered by Georgia's congressional districts and by Georgia's requirement that those who do not win a majority vote in a primary face runoff elections. See *Gingles*, 478 U.S. at 45.

Finally, the district court's plan, with only one majority-minority district, would leave black voters substantially underrepresented, while creating two majority-minority districts out of eleven (18%) would not overrepresent African-Americans, who constitute 27% of the State's population. See *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2662-2663 (1994).

C. THE DISTRICT COURT VIOLATED THE PRINCIPLE OF *UPHAM* V. *SEAMON* IN DEPARTING UNDULY FROM STATE POLICIES

The discussion in Part B(2) above, showing that the Illustrative Plan implements Georgia's traditional districting criteria, essentially demonstrates as well that the district court's remedial plan departed unduly from the State's own districting policies, in contravention of *Upham* v. *Seamon*, 456 U.S. 37 (1982). In *Upham*, the Court observed that "[w]henever a district court is faced with entering [a] reapportionment order, * * * it is faced with the problem of reconciling the requirements of the Constitution with the goals of state political policy." *Id.* at 43 (internal quotation marks omitted). That reconciliation "can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect." *Ibid.* As the district court stated in this case, "[i]n fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan." J.S. App. 2a. To this extent, the redistricting context is governed by the same rule that governs all constitutional litigation: the remedial powers of the district court extend only to correcting that

condition that is found to offend the Constitution. *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974).

The district court recognized that state legislative policy favored the creation of two majority-minority districts, insofar as that could be accomplished within constitutional and statutory limits and without departing unduly from other traditional districting principles. The court stated that "[i]f Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so."[20] J.S. App. 21a n.16. Thus, the district court accepted in principle that, if a second majority-minority district could be drawn, doing so would be most consistent with state districting policy. The court erred, however, in concluding that such a district was not possible.

The Illustrative Plan shows that the district court should have adopted a plan with two majority-

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[20] The court correctly stated the state legislative policy in this area. See J.A. 153, 188. The first plan that the State adopted in 1991, prior to either of the Section 5 objections that were lodged by the Department of Justice, provides a useful guide to the State's districting principles. The 1991 plan included two majority-minority districts, one of which (the Eleventh) was located in the same general area of the State and based on the same DeKalb County to Bibb County axis as the Eleventh District in the Illustrative Plan. Compare J.S. App. 46a (1991 plan) with *id.* at 44a (Illustrative Plan). The State eventually drew the district in a way that led to its being found unconstitutional. See *id.* at 13a n.9. That does not negate the fact that, since the 1990 census, it has been part of the State's redistricting policy to draw two majority-minority congressional districts in Georgia, including one in the area of the Eleventh District.

minority districts. It demonstrates that a plan could have been drawn that comports with Georgia's traditional geographic districting practices and that creates two clearly compact majority-minority districts.[21] The Eleventh District in the Illustrative Plan closely resembles the Eleventh District as configured in the first plan the State passed in 1991. The Illustrative Plan also better comports with the State's "historic[]" policy of protecting incumbents, J.S. App. 18a; see also *id.* at 14a, than does the court's plan, which puts incumbents together in two districts and moves an additional incumbent out of his district. Unlike the court's plan, the Illustrative Plan leaves the residences of all incumbents in the districts they currently represent. See United States' Response to Plaintiffs' Plans Remedy 4X and 4X-R, R. 369, at 10 (filed Nov. 21, 1995).[22] Nor does the Illustrative Plan

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[21] The district court's rejection of the State's decision to draw a majority-black, urban/suburban Eleventh Congressional District stretching southeast from metropolitan Atlanta, in favor of a majority-white, urban/suburban district stretching northeast from metropolitan Atlanta, is especially troubling, because it treats the State's efforts to create a majority-black district "*less* favorably than similar efforts on behalf of other groups." See *Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring).

[22] The State's policy avoids putting incumbents to the choice of either running against other incumbents, retiring, or seeking reelection from a substantially different constituency from the one that elected them. The 1996 primary elections have been held under the court's plan. Four incumbents—including the representatives of the two majority-minority districts that were declared unconstitutional—ran either in different districts from those they had previously represented or in districts that no longer included their residences. Each of them won their party's nomination, and all face opposition from a candidate of the opposing party in the general election.

suffer from the defects that this Court found in *Miller* v. *Johnson*; it does not take race into account as the "predominant, overriding factor," *Miller*, 115 S. Ct. at 2490, that "subordinated traditional race-neutral districting principles," *id.* at 2488, or substantially disregard "customary and traditional districting practices," *id.* at 2497 (O'Connor, J., concurring). See *Bush* v. *Vera*, No. 94-805 (June 13, 1996), slip op. 5 (O'Connor, J., concurring) ("States may intentionally create majority-minority districts, and may otherwise take race into consideration without coming under strict scrutiny.") There was therefore no basis for the district court to disregard the state legislature's choices.

The district court's error is substantially similar to the error committed by the district court in *White* v. *Weiser*, *supra*. In that case, two remedial plans were presented to the district court. The court selected the one that had a higher population deviation and departed more from the malapportioned plan that the State had adopted, but that split fewer counties. See 412 U.S. at 795-796, 797 n.16. This Court reversed that decision, finding that the court should have adopted the plan with a lower population deviation that "most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements." *Id.* at 796. In *Upham*, 456 U.S. at 41-42, the Court relied on that result in summarily reversing a district court's adoption of a remedial plan that disregarded state policy more than necessary to cure the violation. Reversal is also warranted here.

D. THE DISTRICT COURT'S PLAN VIOLATES SECTION 5'S NONRETROGRESSION STANDARD

Although we did not present any question in our Jurisdictional Statement concerning the application of the nonretrogression standard of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to the district court's plan, the Abrams appellees did so. See 95-1425 J.S. at i (Question 2). This Court noted probable jurisdiction with regard to both appeals. We therefore address below the appropriate analysis of Section 5's nonretrogression standard, as it would apply to this case. As we explain below, application of the nonretrogression standard in this case turns on the same factors as the Section 2 and *Upham* v. *Seamon* arguments that we have presented above.

1. Under Section 5 of the Voting Rights Act, redistricting plans adopted by covered jurisdictions must be submitted to the Department of Justice or the District Court for the District of Columbia for preclearance before they can be implemented. That requirement generally extends even to court-ordered remedial plans. See *McDaniel* v. *Sanchez*, 452 U.S. 130, 149-150 (1981) ("The federal interest in preventing local jurisdictions from making changes that adversely affect the rights of minority voters is the same whether a change is required to remedy a constitutional violation or is merely the product of a community's perception of the desirability of responding to new social patterns."). There is a limited "court decree" exception to the preclearance requirement, however, for plans that a court itself fashions (rather than relying on a plan presented by a litigant). *Id.* at 148-149 (quoting the 1975 Senate Committee Report on extension of the Voting Rights Act); *Connor* v. *Johnson*, 402 U.S. 690, 691 (1971) (per

curiam). The district court announced that the plan that it adopted in this case, although "it resembles some of the legislative plans" the State adopted in 1982 and in the post-1990 redistricting, J.S. App. 27a, was the court's "own unique product," *id.* at 28a, and thus fell within the exception for court-fashioned plans.

2. The fact that the district court's plan did not require submission for Section 5 preclearance does not mean that the substantive standards of Section 5 have no bearing on the adequacy of the district court's remedial determination. Even when a court is formulating its own remedial plan, it should ascertain that the resulting plan satisfies the legal standards applicable to redistricting plans, and Section 5 provides one source of such standards. Cf. *Connor*, 431 U.S. at 415 (court-ordered plan must be "free from any taint of arbitrariness or discrimination"). In particular, Section 5's nonretrogression standard was designed "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). That danger exists when a court replaces an existing plan with a new one. Although the preclearance mechanism is not applicable to court-fashioned plans, a court "should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." *McDaniel*, 452 U.S. at 149 (quoting S. Rep. No. 295, 94th Cong.,

1st Sess. 19 (1975)). Accord *Edge* v. *Sumter County School Dist.*, 775 F.2d 1509, 1510 (11th Cir. 1985).[23]

The only Section 5 standard at issue in this case is the basic nonretrogression requirement. In order to apply that requirement, a benchmark must be established and the voting change at issue—the district court's remedial plan—must be measured against that benchmark to determine whether the opportunities of minority voters will be "augmented, diminished, or not affected by the change affecting voting." *Beer*, 425 U.S. at 141 (emphasis omitted). The initial step in applying the nonretrogression requirement is to determine the appropriate benchmark.

3. In their Jurisdictional Statement, the Abrams appellants argued that the district court's plan is retrogressive under Section 5, regardless of whether the benchmark is "the state's initial [1991] eleven seat plan containing two majority black districts, or the state's clearly articulated policy and goal of creating two majority black districts." 95-1425 J.S. 20. The Abrams appellants also suggested that the plan the State adopted and put into effect in 1992 containing three majority African-American districts (the 1992 Plan), when cured of its unconstitutional defects, could provide a benchmark as well. *Id.* at 20 n.10. The Johnson appellees, on the other hand, have argued that the State's *1982* plan provides the appropriate benchmark for Section 5 analysis. Johnson Mot. to Aff. 25; see also Georgia Mot. to Aff. 14-16.

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[23] The district court appeared to believe that its plan did not have to be measured against nonretrogression requirements, see J.S. App. 27a n.20, but it nonetheless "note[d]" its view that its remedy "is not retrogressive" and "does not violate Section 5," *id.* at 26a, 27a.

The district court agreed with the Johnson appellees. J.S. App. 27a n.20. In our view, the appropriate benchmark by which to measure retrogression in the circumstances of this case is the 1992 Plan.

Under 28 C.F.R. 51.54(b)(1), "the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission." That plan will not be used as the benchmark, however, if it

> was not in effect on the jurisdiction's applicable date for coverage [which, for Georgia, was November 1, 1964, see 28 C.F.R. Pt. 51, App.] and is not otherwise legally enforceable under section 5.

Ibid. Therefore, where the plan in effect at the date of the submission either was in effect on the coverage date or was itself precleared, it provides the appropriate Section 5 benchmark.

The 1992 Plan satisfies those criteria. It was the plan that was in effect when the district court decided this case, since it had been used by the State in the 1992 and 1994 congressional elections. That plan had received Department of Justice preclearance and was "legally enforceable under section 5." Referring to other provisions in the same regulations, this Court has recognized that "the construction placed upon the [Voting Rights] Act by the Attorney General * * * is entitled to considerable deference." *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178-179 (1985); *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 131-132 n.21 (1978); see also *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 508-509 (1992); *Perkins* v. *Matthews*, 400 U.S. 379, 390-391 (1971).

The fact that the 1992 Plan is the benchmark does not mean that all plans that reduce voting opportunities for minority groups as compared with that benchmark would violate the retrogression standard. Specifically, a reduction in minority voting opportunities that is required in order to bring a State's electoral practices into compliance with the Constitution cannot be said to be "retrogressive" in the sense used by this Court in *Beer* and *City of Lockhart* v. *United States*, 460 U.S. 125, 133-134 (1983). Accordingly, insofar as a reduction in minority voting opportunities is necessary to satisfy the Constitution, that reduction does not violate the principles of Section 5. See 52 Fed. Reg. 486, 488 (1987). For that reason, while the appropriate benchmark in this case is the 1992 Plan, legally significant retrogression would occur only insofar as a new plan reduces minority voting opportunity more than necessary to correct the constitutional defects of the 1992 Plan.[24]

The modification necessary in the 1992 Plan in order to employ it to measure Section 5 retrogression should not be any greater than necessary to correct its constitutional defects. Assume, for example, that a State subject to Section 5 enacts a districting plan with three majority-minority districts, one of which is an unconstitutional racial gerrymander. It would be inconsistent with Section 5 to permit the State to cure the defect in the plan by substituting a new plan with *no* majority-minority districts; the fact that one of three districts is constitutionally defective does not license the complete retrogression that would occur with the elimination of all majority-minority

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[24] We therefore do not contend that the very aspect of a plan that is unconstitutional could serve as a benchmark.

districts. Similarly, where a State has drawn a single majority-minority district as an unconstitutional racial gerrymander in an area of the State in which a constitutionally acceptable majority-minority district could have been drawn, see *Bush* v. *Vera*, No. 94-805 (June 13, 1996), slip op. 6-7 (O'Connor, J., concurring), the State would fail to comply with Section 5 if it were simply to eliminate the unconstitutional majority-minority district to cure the constitutional defect, without substituting a constitutionally valid majority-minority district. The legislative policy underlying the retrogression analysis is that a covered jurisdiction, having once acted to permit minorities to achieve a certain level of political participation, may not act to reduce that level. See *Beer*, 425 U.S. at 140 (purpose of Section 5 effects test is "to prevent States from undoing or defeating the rights recently won by Negroes") (brackets and internal quotation marks omitted) (quoting H.R. Rep. No. 397, 91st Cong., 1st Sess. 8 (1969)).

4. The district court erred in justifying its comparison with the 1982 Plan, rather than the 1992 Plan, on the ground that "28 C.F.R. § 51.54(b)(1) * * * dictates using the last constitutional plan on the ground if the current plan is unconstitutional." J.S. App. 27a n.20. The cited regulation precludes use as a benchmark of a plan that is "not * * * legally enforceable *under section 5*" (emphasis added)—*i.e.*, a plan that was not in use on the coverage date and has not been judicially or administratively precleared. The provision does not require analysis of whether the benchmark is legally valid in other respects.

The use of unconstitutional plans as the bases for Section 5 retrogression analyses was intended by Congress. Compare Johnson Mot. to Aff. 25. The

Congress that enacted Section 5 was surely aware that many of the practices in effect in covered jurisdictions on the coverage date were unconstitutional. Cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966); see also *Beer*, 425 U.S. at 140. That fact has never been thought to bar use of those practices as Section 5 benchmarks for covered jurisdictions. Population changes that result in a districting plan becoming malapportioned (and therefore unconstitutional)—as occurred with the 1982 plan in this case—also do not bar the use of the malapportioned plan as a Section 5 benchmark. This Court also has held that the practices actually in effect in a jurisdiction provide the appropriate benchmark for Section 5 analysis, even though those practices were legally invalid as a matter of state law. See *City of Lockhart*, 460 U.S. at 133 ("Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect."); *Perkins*, 400 U.S. at 394.

5. The most appropriate benchmark to measure retrogression in this case is thus the 1992 Plan, modified as necessary to cure its unconstitutional defects. The constitutional defects in the 1992 Plan could not have been corrected without eliminating one of its three majority-minority districts. The relevant question thus is whether it was necessary to remove *two* of those majority-minority districts, as did the plan adopted by the district court, in order to make the 1992 Plan constitutional.

In the district court's view, eliminating two majority-minority districts was necessary, and any modification of the 1992 Plan to make it constitutional would therefore leave the State with only one majority-minority district. The court stated that it

"considered the possibility of creating a second majority-minority district and concluded that to do so would require us to subordinate Georgia's traditional districting policies and consider race predominantly, to the exclusion of both constitutional norms and common sense." J.S. App. 21a. See also *id.* at 20a n.15. If that were correct, then the district court's plan, containing one majority-minority district, would not violate the nonretrogression standard.

We have shown above that the district court was mistaken in finding that it was impossible to draw a legally valid second majority-minority congressional district in Georgia. The Illustrative Plan shows that a second such compact district in the east-central portion of Georgia could be drawn in full compliance with the State's legitimate districting policies. The district court's one-district plan is therefore retrogressive, since it provides less opportunity for minority voters than would the 1992 Plan, after that plan was modified to eliminate its constitutional defects. The nonretrogression principle thus provides an additional basis for reversal of the district court decision in this case.[35]

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[35] The retrogression issue in this case is very closely related to the analysis under Section 2 and *Upham* v. *Seamon*. The district court itself recognized that its reasons for finding its plan nonretrogressive were the same as its reasons for finding that that plan complied with Section 2 and state policies generally. See J.S. App. 27a (stating the district court's plan "does not violate Section 5 for the same primary reasons that it does not violate Section 2"). It also stated that, "[i]f Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so." *Id.* at 21a n.16. Accordingly, if the district court was required by

CONCLUSION

This Court should reverse the district court's order entering the remedial plan and remand the case to the district court with instructions to develop and put in place a new plan that is consistent with constitutional one-person, one-vote requirements and that contains two compact majority-minority districts.

Respectfully submitted.

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JULY 1996

Section 2 or the principles of *Upham* v. *Seamon* to draw two majority-minority districts, the nonretrogression principles of Section 5 require the same result. Conversely, if the district court were correct in stating that it was impossible to use Georgia's redistricting principles to draw two majority-minority districts, then the district court's failure to do so would not have violated the nonretrogression principle of Section 5.

APPENDIX

1. Article I, Section 2, of the United States Constitution provides, in pertinent part:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States[.] * * *
>
> * * * * *
>
> Representatives * * * shall be apportioned among the several States which may be included within this Union, according to their respective Numbers[.] * * *

2. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other

members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

3. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides, in pertinent part:

> Whenever a State * * * with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, * * * such State * * * may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, * * * and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice,

> or procedure has been submitted by the chief legal officer or other appropriate official of such State * * * to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission[.] * * *

4. Section 51.54 of Title 28 of the Code of Federal Regulations provides:

> (a) *Retrogression.* A change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. See *Beer* v. *United States*, 425 U.S. 130, 140-42 (1976).
>
> (b) *Benchmark.* (1) In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission. If the existing practice or procedure upon submission was not in effect on the jurisdiction's applicable date for coverage (specified in [28 C.F.R. Pt. 51, App.]) and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and, except as provided in paragraph (b)(4) of this section, the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

(2) The Attorney General will make the comparison based on the conditions existing at the time of the submission.

(3) The implementation and use of an unprecleared voting change subject to section 5 review under § 51.18(a) does not operate to make that unprecleared change a benchmark for any subsequent change submitted by the jurisdiction. See § 51.18(c).

(4) Where at the time of submission of a change for section 5 review there exists no other lawful practice or procedure for use as a benchmark (e.g., where a newly incorporated college district selects a method of election) the Attorney General's preclearance determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups.

(13) 95-1425

(12) Nos. [illegible], 95-1426

Supreme Court, U.S.
FILED
SEP 12 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LUCIOUS ABRAMS, JR., *et al.*,
Appellants,

v.

DAVIDA JOHNSON, *et al.*,
Appellees.

On Appeal from a Three Judge Panel of the United States District Court for the Southern District of Georgia

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QUESTIONS PRESENTED

1. Whether the district court's order and redistricting plan are reviewed under the clearly erroneous standard?

2. Whether the district court properly applied Georgia's traditional districting principles to give expression to the state's uncoerced and constitutional policy choices while still providing a complete remedy of the racial gerrymandering that rendered the 1992 plan unconstitutional?

3. Whether the Voting Rights Act mandates the retention of District Eleven as a majority minority district?

4. Whether the evidentiary hearing on remedy afforded Appellants a full opportunity to articulate their contentions respecting the constitutionality of the Second District and the district court's remedial obligations under the Voting Rights Act?

5. Whether the Court Plan's *de minimis* population deviation between districts violated Article 1, § 2 of the Constitution?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 94-1425, 95-1460

LUCIOUS ABRAMS, JR., *et al.*,
Appellants,

v.

DAVIDA JOHNSON, *et al.*,
Appellees.

On Appeal from a Three Judge Panel of the United States District Court for the Southern District of Georgia

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BRIEF OF APPELLEES

STATEMENT OF THE CASE

This case presents the question of the appropriate remedy for an unconstitutional racial gerrymander violative of the Equal Protection Clause of the Fourteenth Amendment where a federal court, rather than a state legislature, is required to draw the remedial plan. What is not at issue is the unconstitutionality of the two new majority minority congressional districts Georgia was forced to fashion following the 1990 census. The breadth of the racial gerrymandering that caused both the Second [1] and

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[1] All parties to the Second District litigation now concede District Two is unconstitutional. *See* Answer of the United States. No appeal was taken from that decision. As noted in *Johnson v. Miller*, 922 F.Supp. 1522, 1553 n.1 (S.D.Ga. 1995) (hereinafter referred to as *Johnson II*):

> The Department of Justice contended that, *as a matter of law*, the Second District was unconstitutional considering . . . the Supreme Court's affirmance of . . . [*Johnson v. Miller*, 864 F.Supp. 1354 (S.D.Ga. 1994)] [emphasis added].

Eleventh Congressional Districts to be struck down is amply described in the district court's three opinions [2] and in this Court's opinion in *Miller v. Johnson*, 515 U.S. ——, 115 S.Ct. 2475 (1995).

A. The Unconstitutional Districts.

Understanding the full scope and impact of race-based demography in the Second and Eleventh Districts is important to this case, because it provides a good gauge against which to measure the Appellants' allegations that the district court went beyond what was necessary to cure their constitutional deficiencies. With respect to the Eleventh District, both the district court and this Court found racial motivations permeated the entirety of its geography. Its predominate purpose, from its metropolitan fountainhead in south DeKalb County, to its long trek through sparsely populated majority black rural counties in east central Georgia, and ending in the black neighborhoods of urban Augusta and coastal Savannah,[3] was to maximize the number of minority voters in the district.

This Court did not base its conclusion that the Eleventh District's boundaries were predominantly based on race solely on the irregular shape of the district. The cosmetic changes Appellants propose would therefore do little to correct the overriding racial purpose of its architecture. A plethora of other facts confirmed the district's racial purpose, including the State's concession that " '[i]t is undisputed that Georgia's eleventh is the product of a desire by the General Assembly to create a majority black district.' " *Miller*, 115 S.Ct. at 2489. In deciding the

[2] *Johnson v. Miller*, 864 F.Supp. 1380 (S.D.Ga. 1994) (hereinafter *Johnson I*) (Eleventh District held unconstitutional); *Johnson II*, 922 F.Supp. 1552 (Second District held unconstitutional); and *Johnson v. Miller*, 922 F.Supp. 1559 (S.D.Ga. 1995) (hereinafter *Johnson III*) (remedial plan promulgated).

[3] This Court described these minority populations as "260 miles apart in distance and worlds apart in culture." *Miller*, 115 S.Ct. at 2484.

question of whether race predominated, this Court agreed with the district court: the DOJ-mandated reliance on racial factors as the foundation of the Eleventh District was a systemic illness that could not be cured simply by cancelling the "Macon-Savannah trade." As noted in *Miller*, 115 S.Ct. at 2484:

> The Almanac of American Politics . . . [stated]: "Geographically, it is a monstrosity, stretching from Atlanta to Savannah. Its core is . . . lightly populated, but heavily black. It links by narrow corridors the black neighborhoods in Augusta, Savannah and southern DeKalb County."

The *Miller* Court credited the district court's findings on this issue in every important regard. *See id. passim.* All of these fact findings are *res judicata* in this case:

(1) "The evidence was compelling 'that there are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District.' " *Miller*, 115 S.Ct. at 2490.

(2) The fact that "the boundaries of the Eleventh . . . follow many precinct lines . . . is because Ms. Meggers [4] designed the Eleventh District along racial lines, and race data was most accessible . . . at the precinct level." *Id.*

(3) This Court agreed with the district court in finding the " 'four discrete, widely spaced urban centers that [supply the district's minority population] have absolutely nothing to do with each other . . . .' " *Id.* at 2484.

(4) "In short, the social, political and economic makeup of the Eleventh District tells a tale of disparity, not community." *Id.*; *see also Johnson I*, 864 F. Supp. at 1376 & 1389-90.

[4] Linda Meggers is the State demographer who was charged with the task of incorporating the Black-Max Plan into the State's plan. *Id.* at 2489.

(5) "The Justice Department would accept nothing less than abject surrender to its maximization agenda . . . [T]he General Assembly acquiesced and as a consequence was driven by its overriding desire to comply with the Department's maximization demands." *Johnson I*, 864 F. Supp. at 1366; accord *Miller*, 115 S.Ct. at 2489.

The very same maximization policies the United States Department of Justice (DOJ) employed to create the Eleventh District also forced the State to create a third majority minority[5] district in southwest Georgia. The Second District racially partitioned 12 of its 35 counties and 14 of its municipalities,[6] using "narrow land bridges"[7] to hold it all together. The district court was unanimous in finding the Second District unconstitutional.[8] Appellants do not seriously question the district court's remedy with respect to the Second District, focusing their appeal instead on the contention that Section 2 of the Voting Rights Act (hereinafter VRA) required the Eleventh District be maintained as a minority district.

B. The Court's Plan.

The chronology of events leading to the district court's preparation of a remedial congressional plan (hereinafter referred to as the Court Plan) are succinctly set forth in the order on appeal. *See Johnson III*, 922 F. Supp. at 1559. The district court clearly noted the Court Plan was

[5] For ease of reference, Appellees hereinafter will refer to a majority minority district as a minority district.

[6] *See Johnson II*, 922 F.Supp. at 1554.

[7] *Id.*

[8] *Id.* at 1556. While the State did not formally concede the constitutional question, it entered into factual stipulations that admitted the predominance of race in its design, and the absence of any compelling state interest to justify race-based districting of the kind and nature found in the Second District. *See* Joint Stipulations filed with the Court on September 25, 1995.

not a legislative plan[9] returned to constitutional life by smoothing out a few gerrymandered edges. The large size of the two unconstitutional districts (which include almost a third of the state's 159 counties), their location on opposite sides of the state, and the rampant splitting of cities and counties caused the Second and Eleventh Districts to share racially gerrymandered boundaries with the First, Third, Fourth, Fifth, Eighth and Tenth Districts. These adjoining districts are unavoidably impacted by the ripple effect of curing the widespread gerrymandering this Court confirmed to exist in District Eleven and the district court chronicled in District Two. *See Johnson II*, 922 F. Supp. 1552 *passim*. The districts that did not adjoin the unconstitutional districts remain virtually unchanged.[10]

The district court drew on the 1972 and 1982 plans for the state's traditional districting principles and the historical cores of the existing ten districts.[11] *See Johnson III*, 922 F. Supp. at 1563-65. In so doing, the district court returned the districting process to the correct sequence. The original ten districts were pencilled in, with population deviation issues dictating line changes as well as where the new Eleventh District should be located. There is no racial agenda in such a common-sense approach to the issue. It allowed the district court to begin on the high

[9] The district court did not want to leave itself exposed to Section 5 review should the DOJ argue the Court Plan was actually a "legislative plan" reanimated by the court. *See, e.g., McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981); *Johnson III*, 922 F.Supp. at 1569.

[10] Districts Six, Seven and Nine were not significantly changed in the Court Plan. Any changes in District Nine were solely to accommodate the placement of District Eleven in a growth area of the state. *Johnson III*, 922 F.Supp. at 1563.

[11] Despite the degree of gerrymandering in the 1992 Plan, their criticism of the plan did "not mean that we ignored [it] . . . altogether, only that our consideration of it was tempered by its origins." *Johnson III*, 922 F.Supp. at p. 1561, n.2. The district court also solicited remedial plans from all parties based on the first plan Georgia submitted. *See* R.329 Order of October 30, 1995.

ground of a precleared plan; utilizing the benchmark plan as a starting point was the most effective way to give voice to the prior expressions of legisltative intent that were not contaminated by the DOJ's "shortsighted and unauthorized view of the VRA." *Miller*, 115 S.Ct. at 2494.

C. The 1991 Unprecleared Plan.

The district court also considered the legislature's first plan which was rejected by the DOJ.[12] The district court expressed valid concern about the value of this rejected plan as a guide to legislative intent. That concern tells us precisely why the district court did not view the first plan as a self-contained solution to a constitutional problem of this magnitude:

> The first 1992 Plan gave us a clearer understanding of legislative intent, but it was not a perfect guide since it contained many of the same features in its Eleventh District that found their way into the unconstitutional Eleventh—connecting the south DeKalb County urban minority population with the primarily rural east Georgia minority population.

Johnson III, 922 F. Supp. at 1563 n.9.

Appellants' main argument against the Court Plan is that the rejected first plan included two minority districts which Appellants contend are required by the Voting Rights Act. However, Ms. Meggers explained at trial that the origins of a second minority district stemmed from the DOJ's insistence that the VRA required the creation of all possible minority districts:

> Meggers: To be honest . . . I was partly at fault for drawing it like we did in 1991. [It was based on] my understanding of [what] I thought the Department of Justice was going to make us do . . . . [At

[12] *See Johnson III*, 922 F.Supp. at 1563. Appellants contend this first plan reflected the "true" state districting policies and intentions with respect to the creation of a second minority district. As will be seen *infra*, the evidence is to the contrary.

> first] none of the ways I drew it ever showed a total of a 50 percent minority population . . . . At the first public hearing, we were presented . . . a map . . . that . . . drew it from South DeKalb over to Augusta and then to Macon. The initial response in our office was that's ridiculous. We don't have to draw that . . . . I was the one who said if it was there we have to draw it. It was said that it doesn't make any sense and I said maybe not, but . . . we may get into trouble with the Justice Department if we don't draw it . . . like that and I think that was the main reason they [drew it] . . . .[13]

The primary source of Georgia's trepidation came from a seminar Meggers and the reapportionment committee attended in Baltimore in 1990 where John Dunne, then the Assistant United States Attorney for Civil Rights in charge of the Voting Rights Section, spoke. The legislators came away feeling "threatened." Georgia was publicly singled out as a known violator of the VRA. They left believing the DOJ would demand maximization as the *quid pro quo* for preclearance; they were right. *See* Testimony of Rep. Sonny Dixon, R.Tt. 80-81 ("we were threatened [and] used as an illustration by Mr. Dunne of [all] that was evil in redistricting"); Testimony of Rep. Bob Hanner, R.Tr. 73-75 (obligation to create all technically possible minority districts); Deposition testimony of Speaker Thomas Murphy, pp. 6-7 read into the record at R.Tr. 78 ("Mr. Dunne and the Justice Department . . . told us we had to have more black majority districts . . .").

Appellants rely heavily on pre-*Miller* statements by the Appellee Murphy and arguments made by the State's counsel regarding the first plan the legislature passed in 1991 and the DOJ rejected in 1992. ACLU Brief, 35-36. These comments were both made during the pendency of the Eleventh District litigation wherein the State was

[13] Remedy Hearing of October 30-31, 1995 [hereinafter R.Tr. 431-432].

contending "bizarreness" was a necessary element of the *Shaw* cause of action.[14] The fact Speaker Murphy or the State's counsel believed the first rejected plan was not as bizarre as the adjudicated plan does little for its post-*Miller* constitutionality. Moreover, the Speaker's advisor, Linda Meggers, has testified as to her reasons for soliciting support for the first plan within the Legislature. That testimony readily shows that race was the predominant factor relied on by the State's demographer.

Ms. Meggers was not alone in her understanding of the DOJ's position in 1991. Even the courts routinely defined the reach of Section 2 in terms of how many minority districts were possible. For example, the Florida congressional district found unconstitutional in *Johnson v. Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996), was drawn by a three judge court. *See DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1085 (N.D. Fla. 1992). The *Wetherell* court expressed the following view which, at the time, was widely held:

> [A]lthough respecting traditional county boundaries is a desirable approach, this aesthetic requirement should not undercut the primary goal of creating minority districts.

Id.

In holding the *Wetherell* court's Third District unconstitutional, the court in *Mortham* put their finger on the problem that was the genesis for the *Shaw* cause of action:

> The reason for this line of jurisprudence [*Shaw, Miller*, et al.] is because the [Voting Rights] Act had been used by federal courts, the states, and the [DOJ] to create "racially 'safe' boroughs" for different racial and ethnic groups. *Holder v. Hall*, . . . 114 S.Ct. 2581, 2598 . . . (1994) . . . (quoting *U.S. v. Dallas*

[14] This Court rejected that claim. *Miller*, 115 S.Ct. at 2486 (bizarreness is not "a necessary element of the constitutional wrong or a threshold requirement of proof").

> *County Comm'n*, 850 F.2d 1433, 1444 (11th Cir. 1988) . . . . As Justice Thomas recognized, "that practice now promises to embroil courts in a lengthy process of attempting to undo, or at least minimize, the damage wrought by the system we created." *Holder*, . . . 114 S.Ct. at 2598 . . . [T]he rule from the Supreme Court decisions is clear: Congress did not pass the [VRA] to replace a system of economic and social segregation with a system of political segregation.

926 F. Supp. at 1485. Ms. Meggers was, therefore, in step with then-current thinking in 1991-92 as to what the VRA required: the creation of all possible minority districts.

Ms. Meggers also testified to the consideration the legislature gave to continuing the Eleventh as a minority district during the 1995 Special Session, and why the legislature concluded it was not constitutionally possible. R.Tr. 434.[15] The state's attorney confirmed that was his counsel as well, stating "[w]e very much disagreed [with the DOJ and ACLU] that section 2 mandates there be two black majority districts . . . ." R.Tr. 384.[16]

D. The DOJ's Illustrative Plan.

To achieve the overriding racial purpose of all three configurations of the Eleventh District demanded by the DOJ during the 1991-92 redistricting process, the State was forced to misappropriate the historical cores of four

[15] *See* Plaintiffs' Motion to Affirm, p. 12 (quoting from testimony).

[16] At the remedy hearing, counsel reiterated the State's belief that the first plan was unconstitutional:

> The overall purpose and architecture of the Eleventh that runs from DeKalb to Richmond County to Macon in plan One was all for a racial purpose . . . . [I]t is now a fact that the purpose of that district was borne upon a racial basis and the line drawn in that fashion for that purpose. That in and of itself makes the Eleventh District, going out through east central Georgia . . . unconstitutional. (R.Tr. p. 320).

adjoining districts.[17] Two of those misplaced cores are still included in the DOJ plan. Also, the DOJ's Plan actually intensifies the racial line drawing in DeKalb and Bibb Counties, because the DOJ did not respect precinct lines in its efforts to include black, and exclude white, voters. *See* DOJ Brief, 19.

The DOJ does not articulate, much less prove, a non-racial reason for the division of these urban areas, or offer any community of interest which justifies placing Macon's black population in a district centered in the metropolitan Atlanta area. Macon is the traditional capital of middle Georgia, a very different region from metro Atlanta. It has been the commercial core of the Eighth District for decades. It is wholly contained in Bibb County, a county that has never been divided in any congressional plan. Bibb County's division was cited as evidence of unconstitutional racial gerrymandering. *See Johnson II*, 922 F. Supp. at 1555 n.4.

The district court also noted that "[b]efore 1992, the Second District included no portions of the City of Columbus . . . , [and] no split counties" and that the racial split of Columbus was essential to the Second becoming a minority district. *Id.* at 1554.[18] A proper remedy would have to reunite those cities and counties held to have been unconstitutionally gerrymandered. However, Appellants have not done so.

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[17] South DeKalb was the historical core of the Fourth; Augusta/Richmond County was the core of the Tenth; Macon/Bibb County was the core of the Eighth District; and Savannah was the core of the coastal First District.

[18] The Appellants' alternative plans do not properly adjust the black population figures for the Second to discount the sizable non-voting military population at Ft. Benning in Columbus. When that is done, the Second remains a minority district and Appellants have achieved the once unthinkable: lose both cases yet maintain both minority districts.

E. The ACLU's Plans.

The ACLU bases their case on two interrelated contentions. First, they assert that racial bloc voting generally prevents election of minority candidates.[19] Second, they argue their alternative plans demonstrate that a minority remedial district complying with Georgia's traditional districting principles can be drawn in the area where the Eleventh District is located.

All suffer fatal flaws:

(1) *Abrams A* (J.A. 195): This plan retains both the Second (54.45%) and Eleventh (56.56%) as minority districts by leaving 9 of the original 12 counties racially divided in the Second and 3 of 8 in the Eleventh. Its overall deviation (.29) is not meaningful because the district court specifically found its perpetuation of racially divided counties and cities to be unconstitutional. It also lacks contiguity, apparently due to computer error. DOJ Brief, 6 n.4. It is unknown what the deviation would be when contiguity is restored and the unconstitutionally divided counties reunited. We do know that the next lowest overall deviation for an ACLU sponsored plan is .94 (ACLU-IA Plan, J.A. 198).

(2) *Abrams C* (J.A. 197): This plan's overall deviation is .99 which Appellants now contend is unconstitutional. The same is true for the ACLU IA Plan (.94 overall deviation).

(3) *Lewis-Gingrich Amici-R Plan* (J.A. 193) has an unconstitutional overall deviation of 1.86. Donald Hill was the demographer for the plan. He was employed by the Georgia Republican Party. Deposition of Donald Hill,

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[19] Appellants tie their case to this contention:

> [T]he showing that must be made to establish a Section 2 claim [is] that candidates of choice of African-Americans in the area of the 1992 Eleventh District can win *only* if African-Americans form a majority of the constituency. DOJ Brief, 29.

pp. 4-5.[20] He also did work for the ACLU. *Id.* at 7. In 1991-92, he assisted in the development of the three minority district plans which became the Black Max Plan. He believed a minority district should be drawn if it was technically possible to do so. *Id.* at 20. His stated reason for retaining the racial divisions of Columbus, Macon, DeKalb County and other split counties and cities in his clients' proposed plan was allegedly for "political advantage." Yet, he admitted race was the sole proxy by which such advantage was sought:

> Question: "[Y]ou understand these lines [split cities and counties] were . . . race drawn?
>
> Hill: Initially . . . They're race drawn and they're also politically drawn.
>
> Question: "[W]hen you say politically, you're . . . referring to the fact . . . blacks vote predominantly Democratic . . . , that's the political dividing line you're using . . .?
>
> Hill: I think it's legitimate, yes, they do generally vote Democratic.
>
> Question: In other words, the political line and the racial line [are] synonymous . . .
>
> Hill: Yeah, I'll concede that they do. Yes."

Id. at 49-50; *accord, id.* at 51-52 (Bibb County racial split synonymous with his "political" split).[21]

Mr. Hill also drew the Abrams C Plan advocated by the ACLU. *Id.* at 72-73.[22] He understood his goal was

[20] Mr. Hill's deposition was admitted into evidence. R.Tr. 342-343.

[21] *See* J.A. 204-206. These race maps of the three major urban areas each of Appellants' alternative plans divided on racial lines depict racial density by color: yellow is 60% or greater minority population; orange is 50% to 59% minority and blue is 35% to 49%, with grey being less than 35% minority. R.Tr. 29.

[22] *See* Abrams C (J.A. 197); *Id.* at 85.

to achieve the highest possible minority population in the Eleventh District. *Id.* at 73-74. The Eleventh Districts in the Lewis-Gingrich Plan and the Abrams C Plan are essentially the same. *Id.* at 78.

Appellants try to cover up the fact that each plan maintains the Second District as a viable minority district based on total population adjusted by deletion of non-voting military population.[23] That is accomplished principally by the racial division of urban Muscogee County to include large black urban population concentrations, to exclude large white urban populations, and to incorporate a large non-voting, predominantly white military population at Ft. Benning, which increases the district's effective black population by 2-3%. In contrast, the Court Plan returns Muscogee County and Columbus to its historical role as the core of the Third District. It also reunites Bibb County and returns Macon to its traditional role as the core of the Eighth District.

SUMMARY OF ARGUMENT

In *Shaw v. Reno*,[24] *Miller v. Johnson*, and their growing progeny, this Court has made clear the Fourteenth Amendment will not permit the computer-driven ghettoization of black citizens into their "own" districts as a way to enhance racial diversity within the halls of government. The adverse side effects are just too great, both for our society and our Constitution.

The position of the parties in this case illustrate their very different perceptions of what *Miller v. Johnson*, 115 S.Ct. 2475, stands for. Appellants hear only a slight reprimand over the most bizarre gerrymanders generated

[23] *See supra* note 17. Even unadjusted population figures make the Second a majority-minority district or close to it in each alternate plan offered by the ACLU: Abrams A (54.45%); Abrams C (49.80%); ACLU-LA (49.75%); Lewis-Gingrich (49.41%).

[24] 509 U.S. 630 (1993).

by the well documented DOJ maximization agenda. They still employ Section 2 as a kind of racial geiger counter. They scan precincts, cities, and counties for minority populations and then, in a circular logic essential to the maximization theory, use the location of multiple minority population centers to define a congressional district's boundary lines, no matter how distant or different those pockets of minority population are.

This case reflects only a slight change in the DOJ's approach to the Voting Rights Act. The DOJ now understands that condensing disparate concentrations of minority population clusters into something it can label a "compact naturally occurring minority population large enough to comprise a majority in a proposed district" needs to less obviously subordinate a state's traditional districting principles to the goal of maximization post-*Miller*. However, a "less bizarre" district cannot avoid strict scrutiny where the racial purpose has not changed. Race based districting always requires strict scrutiny under the teachings of *Shaw* and *Miller*, unless traditional districting principles are observed.

The serious inroads Section 5 makes into a state's sovereignty, even when the statute is properly applied, cannot be overlooked. *Cf. Miller*, 115 S.Ct. at 2493. Therefore, the fact the State agrees with the district court's identification and implementation of Georgia's traditional districting principles is an important point in this case. A state's sovereignty, particularly with respect to its internal political affairs, is a cornerstone of the federalist form of democratic government. The fact the sovereign is a jurisdiction covered under the VRA should only heighten rather than dilute judicial awareness of the real potential for violation of the principles upon which our democracy depends. As recently stated in *Bush v. Vera*, —— U.S. ——, 116 S.Ct. 1941, 1960-61 (1996):

> we adhere to our longstanding recognition of the importance in our federal system of each state's sovereign interest in implementing its redistricting plan.

The real harm caused by the DOJ's six-year effort to dictate how this congressional plan must be drawn is to Georgia's sovereign right to redistrict itself. Appellants will say the state abdicated its right to draw the plan. The real truth is that, as long as the Section 5 review process remains as subjective and biased as what Georgia, North Carolina, Louisiana and Texas have experienced, states will not even try to run the preclearance gauntlet in the future. If a federal court is told it too did not "get it right," what hope is there for a legislature with hundreds of members who must balance an even more complex blend of factors than did this three judge court?

This appeal is really nothing more than the DOJ's reassertion of its Section 5 review powers over Georgia's congressional districting process through an overly expansive and improper reading of Section 5. *See, e.g., Georgia v. Reno*, 881 F.3d 7, 12-14 (D.D.C. 1995). Section 5 was intended to permit a limited, straightforward, objective analysis that compared a past practice (or plan) with the new. The DOJ's unilateral assimilation of Section 2 into the Section 5 preclearance process[25] allows the DOJ's maximization demands to proceed under the pretense of a "retrogression objection." *Shaw* and *Miller* should have ended the DOJ's efforts to compress these two sections into a generalized authority to maximize minority districts. As this appeal evidences, the DOJ has not yet accepted the judgment of this Court.

The district court's finding that the VRA did not oblige it to create a second minority district was not clearly erroneous. The Court Plan on appeal is a carefully drawn remedy for the rampant racial gerrymandering that directly impacted eight of Georgia's eleven districts. The Court Plan capably finds the symmetry between remediation of unconstitutional racial gerrymandering and the reinvigoration of the State's redistricting principles, so to

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[25] *See* 28 C.F.R. § 51.55(b)(2).

undo the DOJ's mischief without violating the true purposes of the Voting Rights Act or infringing upon state sovereignty.

The reformed Second and Eleventh (now Fourth) Districts, while majority white, are still distinctly multi-racial. Both African-American incumbents won primary elections in 1996 with comfortable margins of victory over multiple white challengers. The worst thing that could happen now would be for this Court to sanction the DOJ's continued efforts to micromanage Georgia politics via a *de facto* Section 5 review of a court drawn remedial plan, and deny Georgia a well deserved end to this litigation before the new millennium is upon us and the reapportionment process must start anew.

ARGUMENT

I. THE DISTRICT COURT'S ORDER IS NOT CLEARLY ERRONEOUS

Appellants argue that a proper remedy must retain the Eleventh District as a minority district. The district court disagreed, because the facts did not establish the three *Gingles* factors that would obligate a court to consider whether remedial action under Section 2 was warranted under the "totality of the circumstances." *See Johnson v. DeGrandy*, —— U.S. ——, 114 S.Ct. 2647 (1994).

The district court's Section 2 findings are reviewed under the clearly erroneous rule, a deferential standard of review that recognizes the unique ability of a local tribunal to determine the inextricably intertwined factual and legal questions upon which these issues turn. *See Fed. R. Civ. P.* 52(a).[26] The clearly erroneous rule has been

[26] The quantum of deference due a district court's findings under the clearly erroneous standard is well settled. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). A finding is only clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

specifically extended to include ultimate findings of fact in voting rights cases. *See Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982) (trial court's findings due "great deference"). As stated in *Thornburg v. Gingles*, 478 U.S. 30 (1986):

> [O]ur several precedents . . . have treated the ultimate finding of vote dilution as a question of fact subject to the clearly erroneous standard of Rule 52(a). *See, e.g., Rogers v. Lodge*, 458 U.S. at 622-627; *City of Rome v. United States*, 446 U.S. 156, 183 (1980); *White v. Regester*, 412 U.S. at 765, 770.[27]

Id. at 78. *White v. Regester*, 412 U.S. 755, 769-770 (1973), employed a similar analysis:

> [W]e are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . district in the light of past and present reality, political and otherwise.

A district court's assessment of the "totality of circumstances" pertinent to a proper remedy must be given great weight.[28] That deferential standard of review should not

[27] Elsewhere in *Gingles*, 478 U.S. at 79, this Court provided its rationale for the application of Rule 52(a) to ultimate findings in vote dilution cases:

> [T]he application of the clearly erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

[28] In discussing how best to fashion an appropriate remedy for a VRA violation, this Court observed:

change when the remedy is constitutional in scope. Here, the district court brought to bear not only local knowledge, but its considerable experience with this specific case.[29] This is apparent from the three opinions it has produced to date. That experience was an indispensable ingredient in the sound judicial determination that Georgia's traditional districting principles were subordinated to racial considerations in creating the Eleventh and Second districts. This Court upheld that determination in *Miller*, 115 S.Ct. at 2494. There is no reason to suggest the district court would now misjudge those same issues in crafting a remedy properly balancing Georgia's traditional districting principles with the often competing goals of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment.

The same deferential standard of review should logically apply to a court's findings as to the subissues involved in devising a remedial plan. The good faith of a legislature in the electoral districting process is a presumption that is not easily rebutted. *See Miller*, 115 S.Ct. at 2488 (relying on *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 318-319 (1978) (opinion of Powell, J.)). That presumption should be even stronger when the demographer is a three judge court charged with impartiality and a remedial purpose. The Court's calculus as to a *de*

> [S]ince the district court is more familiar with the nuances of the local situation than are we, and has heard the evidence . . . , we think the question of the appropriate remedy is for that court to determine, in the first instance, after hearing the views of both parties.

Perkins v. Matthews, 400 U.S. 379, 397 (1971); *accord, Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982).

[29] Justice Black stated the premise well:

> Above all else, we should remember that no one of us is a resident of Mississippi or the Judicial Circuit of which Mississippi is a part. The judges who entered this order do reside in that Circuit, they heard the evidence and oral arguments, and examined the statistics.

Connor v. Johnson, 402 U.S. 690, 694 (1971) (Black, J., dissenting).

mimimis population deviation is inextricably intertwined with its choices as to how best to remedy the widespread constitutional infirmities in the existing congressional plan. The rationale for deference to the fact-finder on these issues is the same: district courts possess first-hand familiarity with the evidence as well as the local knowledge and experience that are determinative of these issues. *See, e.g., Wright v. Rockefeller*, 376 U.S. 52 (1964).

A. The District Court Afforded Appellants A Full Opportunity To Present Evidence As To A Proper Remedy.

ACLU Appellants contend the clearly erroneous rule should not apply because of an "inadequately developed record" on the Section 2 issue. ACLU Brief, 45. This argument ignores the fact they were provided a full opportunity to develop a record on the question of whether Section 2 required a second or third minority district at the remedy hearing.

With respect to the hearing on the Second District, the ACLU Appellants complain that the state offered no witnesses,[30] but ignore the fact the DOJ conceded liability. The bottom line, once again, is that the ACLU was afforded a full opportunity during the remedy hearing to present any evidence it desired as to both districts.[31]

The ACLU Appellants' participation in the evidentiary hearing afforded them the same opportunity as other litigants to present evidence as to any compelling state interests that would warrant perpetuation of the Eleventh or Second as minority districts. Because all parties were

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[30] This allegation is incorrect. The state offered the testimony of legislators John White, Calvin Smyre and Congressman Sanford Bishop via deposition. Moreover, the DOJ opted to call Bishop as a witness, and he did testify in defense of the district (R.Tr. 93-155).

[31] The ACLU Appellants did offer an expert witness, Selwyn Carter, to testify in support of the ACLU's position and advance its various alternative plans. R.Tr. 294-347.

afforded a full opportunity to present evidence and argument on the obligations the VRA imposed on the remedial plan, the ACLU Appellants cannot avoid application of the clearly erroneous rule.

The other procedural stratagem employed by the ACLU to avoid this deferential standard of review is to contend the remedy hearing should have taken place *after* the court plan was announced. ACLU Brief, 44-45. The ACLU incorrectly cites *SRAC v. Theodore*, —— U.S. ——, 113 S.Ct. 2954 (1993), for this proposition. That brief order vacated and remanded *Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992).[32] The district court had conducted a remedy hearing and received numerous alternative plans. In its order, it stated it did not have the time, due to the imminence of election dates, to conduct a full Section 2 analysis of all the alternative plans offered at the remedy hearing.[33] However, because these interim court plans had the potential to be in place for the remainder of the decade, the Solicitor General argued, as an Amicus, that the district court must conduct a full Section 2 analysis. This Court remanded, citing the Solicitor General's brief. *Theodore*, 113 S.Ct. at 2954.

The Solicitor General did not contend a remedy hearing must take place *after* a court plan is devised.[34] Such

[32] *Burton* involved implementation of two court plans for South Carolina's bicameral legislature after the gubernatorial veto of the legislatively passed plans. *See* 793 F. Supp. 1329.

[33] *Burton*, 793 F. Supp. at 1352. The 1992 elections were in fact held using these court drawn plans.

[34] Appellant ACLU also cites *Edge v. Sumter County School Dist.*, 775 F.2d 1509 (11th Cir. 1985), for the proposition that a court must insure its remedial plan comply with Section 2. That court observed that "[a] hearing must be held to permit the parties to submit evidence on Section 2 issues." *Id.* at 1510. It did not say that hearing must take place after publication of the court's plan. Moreover, the *Edge* court was speaking about the remedy of a VRA violation. Here, the remedy is needed because the district court, as affirmed by this Court, found Section 2 did

a rule would be problematic, since it would potentially deny the court the benefit of alternative plans and evidentiary presentations on the *Gingles* factors before it prepares its plan. Forcing a court to create a plan out of thin air would reduce judicial efficiency and would be inconsistent with the evidentiary requirements of Rule 52. Moreover, unlike the *Burton* court, this district court did conduct a full Section 2 analysis following an evidentiary hearing. Its order articulates its reasons for not including a second minority district in the Court Plan and provides Appellants a complete record on which to prosecute their appeal.[35] Therefore, the clearly erroneous rule should govern this Court's review of the judgment below.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS EQUITABLE POWERS TO REMEDY RACIAL DISCRIMINATION.

The scope of a court of equity's discretion in fashioning a remedy for a constitutional wrong as virulent as the electoral partitioning of the races is a defining issue in this case. As stated in *Connor v. Finch*, 431 U.S. 407, 414 (1977):

> The essential question here is whether the district court properly exercised its equitable discretion in reconciling the requirements of the constitution with the goals of state policy.

A federal court's broad equitable powers to remedy racial discrimination tend to defy bright line definition.[36] "The

not compel the majority minority status of the Eleventh District. Therefore, a hearing to insure the "Section 2 violation" is fully remedied would be nonsensical in a case where remedy is needed because the VRA has been misapplied in violation of the Fourteenth Amendment.

[35] A central contention in the Solicitor's brief was that the *Burton* court's plans were not amenable to appellate review without a full Section 2 analysis conducted by the court below. *See SRAC v. Theodore*, Case No. 92-155 (S.Ct.), Brief of the Solicitor General.

[36] "[I]n seeking to define the scope of [a court's] remedial power . . . in an area as sensitive [as racial discrimination], words are

scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *United States v. Paradise*, 480 U.S. 149, 183-184 (1987). The *Paradise* court went on to note, in a non-redistricting context, that the Court does *not* require plans remedying racial discrimination "be limited to the least restrictive means of implementation." *Id.*

In *Freeman v. Pitts*, 503 U.S. 467 (1992), the Court underscored the broad discretion a court possesses in dealing with racial discrimination:

> The essence of a Court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way *to eliminate the condition*[37] or redress the injuries caused by unlawful action. Equitable remedies must be flexible . . . . The task is to correct, by a balancing of the individual and collective interest, the condition that offends the Constitution.

Id. at 488 (emphasis added).

In a variety of anti-discrimination contexts, this Court has recognized that a district court's remedial powers extend beyond elimination of the actual mechanism of dis-

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poor instruments to convey the sense of basic fairness inherent in equity." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1971). The *Swann* court, citing *Green v. County School Board*, 391 U.S. 480 (1968), went on to offer "workable," "effective," "feasible" and "realistic" as broad defining concepts of a court's equity arsenal when racial discrimination is the wrong to be remedied. *Id.*

[37] Perhaps the most straightforward description of the correct remedy for racial discrimination by a government is Justice Black's order in *United States v. Edgar*, 404 U.S. 1206, 1207 (1971), where the Justice stated that the Fourteenth Amendment mandated "racial discrimination . . . be eliminated *root and branch*." (emphasis added). *Accord, Wright v. Rockefeller*, 376 U.S. at 62 ("uproot all vestiges") (Douglas, J., dissenting).

crimination when a broader remedy is necessary.[38] In the case of voting rights violations, Congress has squarely stated that a district court must "exercise its traditional equitable powers so that it completely remedies the prior dilution . . . ." S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982).

The case of *Milliken v. Bradley*, 418 U.S. 717 (1973), provides good insight into the broad remedial discretion vested in a lower court in cases involving race based districting.

> [A]n interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances, *an interdistrict remedy would be appropriate* to eliminate the interdistrict segregation directly caused by the constitutional violation.

Id. at 745 (emphasis added).[39]

In this case, the court's obligation to eradicate racial discrimination must be reconciled with the fact that redistricting is normally a legislative task. *Miller*, 115 S.Ct. at 2488; *Chapman v. Meier*, 420 U.S. 1 (1975). When a court acts in the legislature's stead, judicial restraint is called for out of respect for our tripartite form of government and the separation of powers doctrine that maintains the balance of powers between the three branches. *See Upham v. Seamon*, 456 U.S. 37, 41 (1981) (per curiam). However, when a state's legislative will has been

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[38] *See, e.g., Green v. County School Bd.*, 391 U.S. 430, 438 (1968); *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1968).

[39] Following the logic of *Milliken*, an interdistrict remedy was warranted here due to the twin forces of "packing" and "bleaching" which resulted in two new saturated minority districts and a number of artificially bleached white districts which share boundaries with the two gerrymandered districts.

overcome by the federal executive and its redistricting process infected with racial discrimination in violation of the Fourteenth Amendment, a court of equity cannot be so tightly tethered by the traditional deference due a legislature. After all, the real victim here is the Georgia legislature. It would be a sad irony indeed for the federal judiciary to fail to afford a full remedy out of deference to a legislative will this Court found to have been subverted.

The district court's constitutional and equitable obligation was to fashion a remedy that eradicated the racial classifications that drove the 1992 congressional plan.[40] If the district lines that caused such wholesale segregation are not completely remedied, the contours of the unconstitutional plan will dictate the configuration of Georgia's congressional districts indefinitely.[41] Appellants attempt to transform *Upham v. Seamon* from precedent designed to protect the sovereignty of a state legislature into a neutralizing agent that dilutes the power of a federal court of equity to provide a full remedy. "Minimal disruption" becomes a guise for preserving the essence of each racially gerrymandered district.[42]

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[40] "The [1992] districting plan overstepped the requirements for section 5 compliance because it was designed to secure proportional representation for black voters in Georgia, not adhere to the VRA." *Johnson I*, 864 F. Supp. at 1385.

[41] The Section 5 retrogression principle institutionalizes the racial choices made by political subdivisions and precleared by the DOJ. To effectuate less than a full remedy insures the racial identities of these gerrymandered districts will become permanent features of the State's congressional plan. *See Johnson III*, 922 F. Supp. at 1567 n.16.

[42] Appellants' determination to override Georgia's will for a second time seems to be fueled more by outdated stereotypical notions about the South, Georgia in particular, that have convinced Appellants that this State is perpetually committed to the disenfranchisement of its minority citizens than by the evidence. While our nation's history of past discrimination supports a healthy skepticism with respect to any change to a voting practice or

When racial discrimination in the context of redistricting is the constitutional wrong to be remedied, a court drawn plan will inevitably impact both the adjudicated districts and their neighbors. Such an impact does not violate *Upham*. Gerrymandering is a function of racial inclusion *and exclusion*. The district court's task involved restoration of the natural and historical cores of all Georgia's district's as well as the return of numerous counties to their rightful economic interest groups.[43] This approach to remedy restored the *functional* districts Georgia had in 1982 without violating the Fourteenth Amendment, the VRA or Georgia's volitional policy choices and traditional districting principles.

For Appellants, there seems to be no cushion between remedial race based districting mandated by the VRA, and race based districting that violates the rights of all citizens under the Equal Protection Clause of the Fourteenth Amendment. If a legislature violates the Fourteenth Amendment by using race to excess, the Appellants' reading of the VRA means the "remedy" must retain the absolute maximum quantum of race-based districting that can be employed without violating the Fourteenth Amendment. It contorts the narrow holding in *Upham v. Seamon*, 456 U.S. 37, prohibiting the judicial revision of constitutional districts that are not necessarily impacted by the "ripple effect" of the remedy, into a bad rule of law that would deny a court of equity the necessary powers to remedy interdistrict race discrimination.

Because it is so often overlooked, it is important to point out the remedy ordered in this case benefits both races. The Court Plan lessens the racial stereotyping that

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procedure by a legislature, it does not justify the Appellants' thinly veiled accusation that a three judge court has discriminated.

[43] The court found Georgia's districts outside the metro Atlanta area had economic communities of interest that provided much of the rationale for their location. *See Johnson III*, 922 F. Supp. at 1565.

is both the instigator and consequence of racially identifiable districts that are not required to remedy past discrimination currently denying minority citizens rights guaranteed them under the Voting Rights Act.

The Appellants' perception is that the political future of minorities has been diminished rather than energized by the Court Plan. This misperception is a direct product of the misguided "group rights" approach they have taken to redistricting. *See e.g., Whitcomb v. Chavis*, 403 U.S. 124 (1974). They measure equality by proportional representation based on the mere color rather than character of the represenative. *Compare Johnson v. Miller*, 929 F. Supp. at 1555; *Mortham*, 926 F. Supp. at 1475.

We have seen the "group rights" approach [44] surface as recently as *Shaw v. Hunt*, —— U.S. ——, 116 S.Ct. 1894, 1906 (1996). It was rejected. Appellants simply do not acknowledge the benefits of multi-racial constitutional districts unless the minority is the majority. Instead, they subordinate real communities of interest to computerized replications only expert demographers understand. *See Johnson v. Miller*, 929 F. Supp. at 1547-48; *Johnson III*, 922 F. Supp. at 1562-65; *Miller*, 115 S.Ct. at 2484, 2490; *Burton*, 793 F. Supp. at 1357. The DOJ and ACLU see only this concocted "virtual reality." In so doing, they assume the very racial stereotyping they allegedly seek to prevent. *See Miller*, 115 S.Ct. at 2486-87; *Missouri v. Jenkins*, —— U.S. ——, 115 S.Ct. 2038, 2064 (Thomas J., concurring) (1995); *Mortham*, 926 F. Supp. at 1493.

No doubt there was a time when racial prejudice was so monolithic that a group rights approach was a necessary but pragmatic evil essential to any progress towards

[44] See Katherine Butler, Affirmative Racial Gerrymandering: Fair Representation for Minorities or A Dangerous Recognition of Group Rights, 26 *Rutgers L.J.* 595 (1995) for a discussion of how the group rights approach to enforcement of the Voting Rights Act has instigated the kind of racial gerrymandering at issue in this case.

breaking down the barriers to opportunity, political or otherwise. A lot of time has passed. The law need not proceed on the premise that a group-based remedy is necessary or appropriate to alleviate past wrongs in our society. *See, e.g., Freeman v. Pitts*, 503 U.S. at 495-96. *Shaw* and *Miller* are now the law of our land. This case presents yet another watershed in the inexorable progress we must make if the aspirations of Voting Rights Act are to be mirrored by the volitional electoral behavior of our nation.

III. SECTION 2 DOES NOT MANDATE RETENTION OF THE ELEVENTH AS A MINORITY DISTRICT.

Despite *Miller v. Johnson*, 115 S.Ct. 2475, the DOJ continues to assert that the VRA requires the district court create another minority district. This Court's decisions make clear that race-based remedies will not be undertaken simply because the DOJ urges it:

> Our presumptive skepticism of all racial classifications . . . prohibits us . . . from accepting on its face the [DOJ's] conclusion that racial districting is necessary under the [VRA]."

Miller, 115 S.Ct. at 2491.[45]

"[F]ederal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993). *See also Growe v. Emison*, 507 U.S. 25, 40-41 (1993). Justice O'Connor stated the reason for this limi-

[45] *See also Adarand Constructors, Inc. v. Pena*, —— U.S. ——, 115 S.Ct. 2097, 2110-11 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-93 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986). This conclusion is also compelled by the fact the DOJ's interpretation of the VRA is not entitled any deference. *Miller*, 115 S.Ct. at 2491. In fact, given the litany of cases finding the DOJ to have totally misinterpreted the VRA, its interpretation must be viewed with considerable skepticism, if not open suspicion.

tation in *Missouri v. Jenkins*, 115 S.Ct. at 2061 (O'Connor, J., concurring) (citations omitted):

> Courts . . . are different. The necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills. The unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation . . . . Unlike Congress, which enjoys " 'discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' " federal courts have no comparable license and must always observe their limited judicial role.

A state, however, may adopt a minority voting district without finding a violation of statutory or constitutional law where it comports with its traditional districting principles and does not violate *Miller*. *See Voinovich*, 507 U.S. at 155. The district court, in fact, considered the issue to be one the legislature should resolve. The court made it clear that policy decisions about the intentional creation of a second minority district must be left to the legislature since the court perceived no statutory or constitutional obligation to create one.[46]

Appellants do not attempt to escape the conclusion that each of their "alternative" configurations for the Eleventh District are predominantly based on race and must withstand the strict scrutiny test. Instead, they contend the results test of § 2(b) of the VRA provides the necessary compelling state interest.

The results test of the VRA is violated only if, "based on the totality of circumstances, it is shown that the

[46] "We do no harm with this plan, which cures the unconstitutionality of the former and can serve in 'caretaker' status until the legislature convenes to change it." *Johnson III*, 922 F. Supp. at 1569.

political processes leading to nomination or election in the State . . . are not equally open to participation by members of [*e.g.*, a racial minority] . . . ." 42 U.S.C. § 1973(b).[47] Appellants have no adverse "results" from these remedial districts (or the former unconstitutional districts) which would suggest a discriminatory effect. The district court's findings in *Johnson I* respecting the absence of legally significant racially polarized voting in the Eleventh District are *res judicata* in this case, since Appellants relied exclusively on the Eleventh District trial record, offering no additional evidence on this issue at the remedy hearing.

A court must possess the equitable discretion to cure a districting plan of racial discrimination by restoring it to a configuration that adheres to traditional districting principles. Such a remedy cannot violate Section 2. This common sense approach to a practical reconciliation of the Fourteenth Amendment and the VRA, so to ease the tension between them, logically applies with even greater force to courts that perform this legislative task. "[F]undamental concerns of federalism mandate that states [and presumably courts acting in their stead] be given some leeway so they are not 'trapped between competing hazards of liability.' " *Bush v. Vera*, 116 S.Ct. at 1969 (O'Connor, J., concurring) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 291 (O'Connor, J., concurring)).

Following the remand in *Miller v. Johnson*, the district court appropriately deferred to the legislature's obligation to fashion a remedial plan. However, that legislative special session deadlocked on the issue.[48] There simply

[47] The constitutionality of § 2(b) has never been addressed by this Court. *See generally Bush v. Vera*, 116 S.Ct. 1941.

[48] In virtually every post 1990 redistricting plan where racial gerrymandering was found to exist, Republican legislators supported black maximization plans, believing it was in their political interest. *See e.g.*, the Lewis-Gingrich Plan; testimony of Donald

was no "strong basis in evidence" that Section 2 required the creation of another minority district. Both the legislature and the district court correctly concluded that an affirmative effort to retain the Eleventh District by replacing Savannah's black population with Macon's, while deleting racial appendages in Twiggs, Wilkes and Richmond counties and intensifying the gerrymander of DeKalb, would be contrary, even contemptuous,[49] of this Court's opinion in *Miller*.

The district court was not free to explore new ways to create minority districts. *See Shaw v. Hunt*, 116 S.Ct. at 1906. Section 2 was designed to remedy proven vote dilution, not to probe potential new sites for minority districts. "Section 2 of the Voting Rights Act . . . is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

The district court's approach is well within the "leeway" Justice O'Connor spoke of in *Wygant* and again in *Bush v. Vera*. It would undermine public confidence in

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Hill, *supra* at p. 12. The Republican/Black Caucus coalition in Georgia, while not large enough to pass a plan, was able to block any redistricting plan that did not contain two minority districts. *See generally, Johnson v. Mortham*, 926 F. Supp. at 1489-90; Kevin A. Hill, Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States, 57 *J. Pol.* 384, 388, table 1 (1995). Hill concluded racial gerrymandering accounted for Republican victories in 1992 in Georgia's First, Third and Fourth Districts, *id.* at 397-98, and correctly predicted Republican victories in Eighth and Tenth Districts in 1994. With the party change of the Ninth District representative, the political subdivision of the delegation now mirrors its racial composition: eight white Republicans and three black Democrats. *See* Juliana Greenwald, Deals Switch to GOP, 53 *Cong. Q. Wkly. Rep.* 1084 (1995).

[49] As stated by the district court, "Georgians deserve a better fate." *Johnson III*, 922 F. Supp. at 1567.

the sovereignty of their state legislature (or a local district court acting on its behalf) to see yet another congressional plan be invalidated. The "leeway" between what is mandated by the Section 2(b) of the VRA, and the unconstitutional predominance of race under the false flag of enhancing minority voting strength must include a reasonable margin of deference to the local legislature/tribunal that draws the plan. Much of the work does, after all, boil down to reasoned judgment calls. It is impeartive that this Court not be drawn into the DOJ's efforts to create as many minority districts as possible in covered jurisdictions by narrowing that "leeway" to the proverbial eye of a needle.

We now possess important new facts which were not known to the district court, but vindicate its vision of a fair and constitutional remedial plan. The 1996 primary elections which govern the nomination process in the Fourth (the unconstitutionally gerrymandered Eleventh's counterpart) and Second District are over. In the Fourth (36.6% minority), African-American incumbent Cynthia McKinney easily defeated three white challengers, garnering 67.47% of the vote, and won outright the Democratic nomination. In the Second (39.21% minority), Sanford Bishop (African-American) defeated two white challengers, getting 59.39% of the vote, and also won outright the Democratic nomination in his district.[50] These electoral results are contrary to the Appellants' contention that racial bloc voting by white voters always denies minority candidates equal access to the electoral processes of nomination for or election to public office, unless they are a majority in the district. *See* DOJ Brief, 29.[51]

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[50] The Court can take judicial notice of these election results. Fed. R. Evid. 201 (facts are not subject to reasonable dispute and capable of "accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). *See generally Corbin v. Cannon*, 838 F. Supp. 561, 562 (M.D. Fla. 1993) (election date of sheriff subject to judicial notice).

[51] In 1996, all three minority candidates won their party's nomination. Representative Lewis was unopposed either in the primary

Just how the Court Plan, which Appellants admit was not purposefully designed to discriminate, denies minority voters equal opportunity to nominate or elect their candidates of choice is not readily apparent. There was no preexisting district where black candidates lost bids for nomination or election. There is no past track record to judge the "effects" of a preexisting district's lines. The two gerrymandered minority districts elected their minority incumbents by landslides in the last two election cycles. Both districts were proven to be overly safe, containing minority populations that did not just offer equal opportunity—they provided a virtual guarantee of victory. Even asuming the VRA sanctioned the creation of minority districts in these locations, these were not narrowly tailored under the strict scrutiny test. *See e.g., Johnson I*, 864 F. Supp. at 1392.

Section 2(b) requires we rely on the actual "results" of elections, rather than predictions. Section 2(b) will also provide a remedy if it is shown that minority candidates in these remedial districts are subsequently denied equal access to the political process because of their race, as opposed to political party affiliation, campaign issues, past performance as an incumbent or other legitimate non-racial reasons for an adverse electoral outcome.[52] Minority candidate success in the Second and Fourth Districts underscores the wisdom of waiting for the "results," before assuming a district will discriminate and imposing a racially safe alternative district that, in this case, would have denied the state a golden opportunity to prove minority candidates can win in majority white districts.

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or general election. To date, minority candidates have had a 100% success rate under the Court Plan. While this is no guarantee of future success, it does signal caution before a court mandates the artificial creation of minority districts based on hypothetical designs that perpetuate race as the dominant design feature.

[52] *See e.g., Johnson v. Mortham*, 926 F.Supp. at 1479, 1490 (obligation to assess political party affiliation and other evidence as alternative explanation for racial rationale for voting patterns).

Appellants will predictably argue two points in reply: (1) the electoral success of these incumbents is not probative of the absence of racial bloc voting generally in Georgia; and (2) the fact they were successful and well regarded incumbents from preexisting minority districts gave white voters a reason to vote for them. Neither of these putative explanations effectively rebut the Appellees' argument. First, the issue of racially polarized voting must be determined after an intensely local appraisal of the voting patterns in the district in question. *See Thornburg v. Gingles*, 478 U.S. 30; *Shaw v. Hunt*, 116 S.Ct. at 1906. It is not a statewide inquiry. *See id.* The most current evidence we have to date as to whether racial bloc voting is denying minority candidates equal access to the political process is the primary elections in each of the court drawn districts where minority candidates won. Those elections contribute another common sense reason to expand the "leeway" that this court should give to a legislative or court plan that is remedial of a racially motivated districting scheme, just as this court affords "leeway" in the form of judicial deference to a districting plan that is remedial of a proven section 2 violation.

A. The ACLU's Expert Did Not Support The Contention That Section 2 Required Two Majority Minority Districts.

The next issue is the evidence offered to prove Section 2 mandated one or both of the unconstitutional minority districts, as modified in the Appellants' alternative plans. At the evidentiary hearing on remedy, Appellants' key witness was Selwyn Carter. He testified as an expert "in the field of demography and redistricting and in assessing plans drafted by others for . . . compliance with the Voting Rights Act." (R.Tr.295).[53]

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[53] Mr. Carter is the Director of Voting Rights Programs for the Southern Regional Council. He represented the Black Caucus in the Georgia General Assembly during the 1995 Special Session.

Carter either prepared or supervised the preparation of every ACLU sponsored alternative plan. (R.Tr. 297-298).[54] Their common feature was retention of majority minority status for the two unconstitutional districts. Carter was asked repeatedly whether he believed such a configuratior of the Eleventh District was mandated by the Voting Rights Act.[55] He never answered this question in the affirmative. The best he could offer was to plead uncertainty:

> Question: . . . [I]s there . . . a single plan [offered by the] ACLU, black caucus or your organization that you can say under oath is required by the Voting Rights Act in terms of a second majority minority district?
>
> Carter: I believe that we are in a gray area of the law.

(R.Tr.332).[56] Carter further admitted that the ACLU's plans were based on a subjective sense of "racial fairness" rather than the requirements of the VRA. R.Tr. 332-3 (testimony quoted in Appellees' Motion to Affirm at 22).

B. The Appellants Offered No Evidence Of Racially Polarized Voting At The Remedy Hearing.

The record from the remedy hearing is similarly devoid of any analysis of voting patterns. In its brief on remedy, the DOJ stated it had retained an expert to assess whether the alternative plans presented to the district court complied wih the VRA. DOJ Brief on Remedy (R. 348).

[54] As noted *supra*, Abrams Plan C was actually prepared by the Republican Party demographer Donald Hill.

[55] See questions posed at R.Tr. 324, 326, 330, 332.

[56] Carter acknowledged there were still clear cases wherein a minority district would be required by the Voting Rights Act (R.Tr. 333). Obviously, this was not one of them. Carter was also unable to testify regarding any community of interest that would serve as a foundation for the race-based configuration of the Eleventh District advocated by Appellants. (R.Tr. 338).

"For this reason, all of the [DOJ's] observations . . . concerning [VRA] compliance *are preliminary and subject to reassessment based on . . . the expert's analysis.*" *Id.* at n.6 (emphasis added). No such testimony was ever offered. It is on this hollow evidentiary record that Appellants contend a second minority district was "mandated" by Section 2.

The expert witness Appellants rely upon is Dr. Alan Lichtman. He testified for the DOJ in the original trial regarding the constitutionality of the Eleventh District.[57] In that case, the district court concluded that the "record failed to demonstrate . . . chronic bloc voting . . . ." *Johnson I*, 864 F. Supp. at 1392.[58] It further elaborated on this finding in *Johnson III*, 922 F Supp. at 1567:

> Statistical evidence . . . showed a significant degree of crossover voting. *Johnson I*, 864 F. Supp. at 1390. We observed that "black and black-preferred candidates in Georgia have achieved many electoral victories . . . and have received significant—occasionally overwhelming—support from both black and white voters within the Eleventh Congressional District." *Id.* at 1390-91. During the Second District trial, Linda Meggers stated that election results in that district indicated white crossover voting. [R.Tr. 438.] Indeed, Congressman Sanford Bishop . . . agreed. *Id.* at 142. [W]hile some degree of polarization exists, it is "not in alarming quantities."

[57] The district court, in large part, rejected his testimony. *See Johnson I*, 864 F. Supp. at 1388 (he was "trounced" by the State's expert Dr. Katz); *id.* at 1891 (Katz was "largely successful" in undermining the testimony of . . . Dr. Lichtman).

[58] The district court noted black candidates in the 1992 Eleventh District Democratic primary received 55% of the white vote. *Id.* at 1391. In the runoff election for the nomination, McKinney won against a white candidate with 56% of the vote and with 23% of the white vote. *Id.* As to the Second District, Rep. Bishop admitted in his testimony he received substantial white voter support. *See Johnson III*, 922 F. Supp. at 1567.

> *Johnson I*, 864 F. Supp. at 1390. The second and third *Gingles* preconditions . . . would not be met in a Section 2 challenge to the remedy.

Johnson I was affirmed by this Court, and *Johnson II* was not appealed. These findings are therefore *res judicata* in this case.

Dr. Lichtman's work has been discredited in this area of the law. The three judge court in *Johnson v. Mortham* noted serious methodological errors in his work, all of which are present in the report and testimony he offered in this case:

> We reject Dr. Lichtman's results because of several critical methodological errors . . . . First and foremost, Dr. Lichtman only examined black versus white elections, excluding all black versus black and white versus white elections, even though there was . . . extensive . . . testimony that the African-American community had a clear candidate of choice in such elections.

926 F. Supp. at 1474. Dr. Lichtman made the same mistake in his Georgia report. For example, he excluded the multiple elections of Wyche Fowler, a white candidate who represented the Fifth District following Andrew Young, even though Fowler was clearly the African American community's candidate of choice. He also excluded from consideration the multiple elections of African-American Congressman John Lewis, even when he defeated white challengers. The *Mortham* court specifically noted Dr. Lichtman's biased disregard of "highly relevant" congressional elections as a basis for their rejection of his findings. *Id.* at 1475.[59]

[59] Other courts have rejected Dr. Lichtman's results because of the bias he shows in selecting elections for inclusion in his report. *See, e.g., SCLC v. Sessions*, 56 F.3d 1282, 1293 (11th Cir. 1995). The *Mortham* court also discredited Dr. Lichtman's findings because he failed to account for the obvious impact party affiliation had on voting patterns. *Mortham*, 926 F. Supp. at 1475.

A final reason given by the *Mortham* court for rejection of Dr. Lichtman's analysis was his inclusion of counties that were not in the congressional district he was analyzing. *Mortham*, 926 F. Supp. at 1478, n.33. The same problem exists with the DOJ's use of Dr. Lichtman's 1994 trial testimony as the evidentiary predicate for their contention that racial bloc voting requires a Section 2 remedy in the Eleventh District, as proposed by the DOJ's Illustrative Plan. That district contains a very different configuration of counties and cities than the original Eleventh District.[60] *Shaw v. Hunt* makes clear that a state cannot provide a Section 2 remedy in a location different from where the alleged Section 2 violation occurred.[61] This record is devoid of a polarized voting analysis that would be applicable to counties that comprise the DOJ's proposed Eleventh District.[62]

IV. THE COURT PLAN IS NOT RETROGRESSIVE.

"A decree of the United States District Court is not within reach of Section 5 of the [VRA]." *Connor v. Johnson*, 402 U.S. 690, 691 (1971) (per curiam); *McDaniel v. Sanchez*, 452 U.S. 130, 138 (1981). Still, the district court did address Section 5 as part of its obligation to insure its plan did not retrogress. *Johnson III*, 922 F. Supp. at 1569 (plan does not violate Section 5).

Appellants argue the Court Plan violates Section 5 because it does not contain two minority districts. In an effort to avoid application of the DOJ's own regulations,[63]

[60] The district in the Illustrative Plan deletes seven counties (Henry, Butts, Greene, Washington, Jefferson, Burke and Richmond). It then adds six in whole or in part (Bibb, Jones, Baldwin, Rockdale, Newton and Morgan).

[61] 116 S.Ct. at 1906.

[62] The other alternative plans have unacceptable deviations and/or retain so much of the unconstitutional gerrymandering that they do not merit serious discussion. *See, e.g.*, Amicus-R (Lewis-Gingrich Plan); Abrams Plans A, C and ACLU-IA. J.A. 191-199.

[63] 28 C.F.R. § 51.54(b). *See Ketchum v. Byrne*, 740 F.2d 1898 (7th Cir. 1984).

Appellants contend any Section 5 benchmark plan for retrogression must contain the same number of voting districts as the plan under review. R.Tr. 279-280; ACLU Brief, 47. This argument ignores two points. First, only a legally enforceable plan can serve as a benchmark for retrogression. *See* 28 C.F.R. § 51.54(b). That precludes reliance on the 1992 Plan, at least insofar as the unconstitutional districts are concerned. Second, as a practical matter, legislative districting schemes routinely add or lose seats with almost every new census. The fact that Georgia added a congressional district does not mean its last constitutional congressional plan cannot serve as the retrogression benchmark.[64]

Until 1992, Georgia had one minority district, the Fifth. It was maintained in the Court Plan with its minority population enhanced to 62%. The 1982 Plan was the only objective benchmark available to the General Assembly in 1992, and the only prior plan that has not been held unconstitutional. The 1982 Plan is the proper retrogression benchmark here.[65] Since the number of minority districts in the Court Plan is identical to that in the last constitutional plan, no retrogression has occurred.

The ACLU makes two alternative arguments under section 5. The first is that the Court Plan is retrogressive under the 1982 Plan, because the proportion of minority districts decrease if just one district out of ten is preserved when an eleventh district is added. Under this approach

[64] Retrogression is determined by a simple measurement: "comparing the gross number of districts with minority population and voting majorities in the old plan and the number of such districts drawn in the proposed plan. This was essentially the approach taken in *Beer*." *Burton v. Sheheen*, 793 F.Supp. at 1346; *accord*, 28 C.F.R. 51.54(b); *see also Beer v. United States*, 425 U.S. 130, 141-42 (1976).

[65] *Accord Johnson v. Miller*, 929 F. Supp. 1529, 1567 (S.D. Ga. 1996) (different three judge panel hearing *Shaw* challenge to 1992 State Legislative districting plans held 1982 Plan is Section 5 benchmark).

to retrogression, any new district would have to be majority minority. Appellants contend Georgia had an obligation under Section 5 to make the Eleventh District majority black, regardless of the absence of a compact minority population entitled to political recognition under the state's traditional districting principles and under Section 2.

The ACLU next argues retrogression should be measured by comparison of the Court's Plan with various alternative plans prepared by litigants such as the DOJ. However, such an approach amounts to converting Section 5 into an ever evolving affirmative action plan.[66] Appellants' goal-oriented construction of Section 5 would create a statutory requirement that virtually all future districts be minority districts. The tension between such an interpretation and the Fourteenth Amendment would render Section 5 unconstitutional.

The DOJ did not contend the Court Plan violated Section 5 in its Jurisdictional Statement. However, it now supports the ACLU's contention that the Court Plan is retrogressive, while conceding that a reduction in minority

[66] *See Burton v. Sheheen*, 793 F. Supp. at 1347. Counsel for the ACLU made this same argument in *Burton* as counsel for Appellant SRAC, an ACLU affiliate in South Carolina. The *Burton* court rejected the theory:

> The erroneous basis for measuring retrogression urged upon the Court by [SRAC] . . . is to compare proffered plans one to another without reference to the existing plan. This proposed methodology is flawed in at least two respects. First, it has no basis in case law, the statutes or § 5 regulations. Second, such methodology serves as a "racial ratchet" which presumes that the plan offering the greatest number of black majority districts is, for that reason alone and regardless of other considerations, the benchmark against which all other plans must be measured. Such an approach enshrines the notion that the Voting Rights Act insures proportional representation by race, a proposition that flies squarely in the face of case law and statute.

Id. at 1347-48 (citing *Beer*, 425 U.S. at 141; 42 U.S.C. § 1973(b)).

voting opportunity required to bring a state's districting plan into

> compliance with the Constitution cannot be said to be "retrogressive" in the sense used by this Court in *Beer* [67] and *City of Lockhart v. United States*, 460 U.S. 125, 133-134 (1983) . . . [and] does not violate Section 5. *See* Fed. Reg. 486, 488 (1987).

DOJ Brief, 40.

Appellants seek to avoid the consequences of this admission by contending the "application of the non-retrogression standard in this case turns on the same factors as the Section 2 argument." DOJ Brief, 36. Appellants' confusing discussion of the proper benchmark for retrogression ultimately begs the question by contending the Section 5 benchmark to be however many minority districts Section 2 requires. DOJ Brief, 43. In *Bush v. Vera*, 116 S.Ct. at 1963, this Court reiterated the limited purpose of Section 5:

> We have made clear that § 5 has a limited substantive goal: " 'to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' " *Miller*, 515 U.S. at ——, 115 S.Ct. at 2493 (quoting *Beer v. U.S.*, 425 U.S. 130, 141 . . . (1976)).

Appellants' definition of an appropriate benchmark as "the 1992 plan modified . . . to cure its constitutional defects" is meaningless. DOJ Brief, 42; ACLU Brief, 20 at n.10. Such an amorphous definition of a benchmark plan against which to measure retrogression runs afoul of *Holder v. Hall*, —— U.S. ——, 114 S.Ct. 2581, 2587 (1994).[68] In *Holder*, the Court made clear that the

[67] *Beer v. United States*, 425 U.S. 130.

[68] This case involved a Section 2 challenge to a single-member county commission. The plaintiffs contended the county, being 20% black, should create a five member commission of single member election districts with one minority district. The plaintiffs advanced this hypothetical five-member commission as the benchmark.

benchmark for retrogression under Section 5 and the benchmark for judging whether a voting practice unlawfully dilutes minority voting strength under Section 2 are not the same. In a Section 5 setting, the benchmark is simply the last legally enforceable plan employed by the jurisdiction prior to implementation of the plan.[69]

Appellants have bootstrapped a Section 5 retrogression argument into this appeal. They infuse a hypothetical Section 2 type benchmark into a Section 5 retrogression analysis by the circular argument that the Section 5 benchmark is the 1992 plan "cured" of its constitutional defects. Since two of three minority districts are unconstitutional, that would, objectively speaking, leave one minority district as the retrogression benchmark. Appellants seek to avoid this inevitable conclusion by insisting the DOJ's Illustrative Plan containing two minority districts is the benchmark, based on their conclusion Section 2 requires two minority districts. DOJ Brief, 42-43.[70] Appellants simply do not properly differentiate between retrogression under Section 5 and discrimination resulting in

[69] *See* 28 C.F.R. 51.54(b). If the plan was a legislative one, the point in time for designation of the benchmark was when the new plan is submitted for preclearance. Since court plans that are not mere clones of legislative plans are exempt from the Section 5 preclearance requirement, the relevant point in time for identification of the benchmark plan is the court plan's date of implementation.

[70] The ACLU's alternate benchmark is the first plan which contained two minority districts but was not precleared. The DOJ's own regulation, 28 C.F.R. 51.54(b), prohibits the use of unprecleared plans as Section 5 benchmarks. *See* DOJ Brief at 41. That would preclude use of the rejected first plan as the benchmark. The only other options are the precleared 1982 Plan and the precleared albeit unconstitutional 1992 Plan. Since the Fifth District is the only constitutional minority district in each, the issue is largely academic.

vote dilution violative of Section 2. *Holder* made the point unequivocally: "Retrogression is not the inquiry in § 2 dilution cases." *Holder*, 114 S. Ct. at 2587.

To offer a hypothetical "illustrative" plan that has never been enacted into law as a Section 5 retrogression benchmark conflates the two sections together so that intended differences are beyond recognition.[71] It is black letter law that statutes must be read so as not to render portions superfluous. Acceptance of the DOJ's argument violates this basic principle of statutory construction. It is this kind of thinking that drives the DOJ's maximization agenda. For the DOJ, the standard against which any voting practice is measured under Section 5 is whatever they can devise via an alternative plan. Such a hypothetical plan is not an automatic mandate for more minority districts.

Despite this Court's sharp criticism of the DOJ's misinterpretation of Section 5, *see Shaw v. Hunt*, 116 S.Ct. at 1904, the DOJ has not altered its position. The DOJ is not willing to accept this Court's repeated admonitions against defining retrogression under Section 5 in terms of what is possible rather than what was past practice. *Miller* and its progeny have not yet deterred the DOJ in its quest to create more minority districts, rather than deferring to the state sovereign or a federal court acting on its behalf.

V. THE COURT PLAN HAS A DE MINIMIS POPULATION DEVIATION BETWEEN DISTRICTS.

The one-person one-vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964), is applicable to court drawn legislative plans. *See, e.g., Chapman v. Meier*, 420 U.S. 1, 22-27 (1975). In *Connor v. Finch*, 431 U.S. 407 (1977),[72]

[71] *Burton*, 793 F. Supp. at 1351.

[72] In *Connor*, the Mississippi Senate Plan had a deviation of 16.5%, and the House Plan had a deviation of 19.3%.

the court held a court-ordered plan designed to remedy a one-person, one-vote violation should "ordinarily achieve population equality with little more than *de minimis* variation." *Id.* at 414.[73]

A comparison of the deviations by district between the Court Plan and the DOJ Illustrative Plan are set forth below. Except for districts 2 and 3, there is little difference. The court's average deviation is .11%; the DOJ's average deviation is .07%. This .04% difference is 328 people out of a perfect district population of 588,928 people. That is *de minimis*.

DISTRICT	COURT PLAN	DOJ PLAN	BETTER DEVIATION
1	—.07	.07	same
2	—.023	.01	DOJ
3	.12	.03	DOJ
4	.07	.06	DOJ
5	.07	.09	COURT
6	.04	.11	COURT
7	.08	.09	COURT
8	—.17	.05	DOJ
9	.08	.08	same
10	—.15	.09	DOJ
11	.08	—.10	COURT

The deviations are identical in Districts One and Nine and virtually identical in Districts Five, Six and Seven. The districts that account for the entire difference in overall deviation between the two plans are Districts Two and Three where the DOJ perpetuates the racial division of

[73] "With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features." *Chapman*, 420 U.S. at 26. Georgia has a history of not dividing counties outside of metropolitan Atlanta and the "unique feature" of having 159 counties (more than any state except Texas), which the district court found to be more than enough building blocks to honor this state policy. *Johnson III*, 922 F. Supp. at 1564 n.11.

Muscogee County and the City of Columbus. Precincts are split to appropriate the requisite black population to continue the Second as a minority district. In doing this, the DOJ had the luxury, bought at the expense of the equal protection clause, of excluding whites until a near perfect deviation is arrived at between the Second and Third Districts. By ignoring the obligation to remedy the gerrymander of Columbus and to respect city, county and precinct boundaries, the DOJ was able to attain deviations of .01 and .03 in Districts Two and Three. On the other hand, the Court's obligation to remedy the racial gerrymander of this county and city provides a compelling justification for the only deviations that differ meaningfully from the DOJ's own plan—even if we ignore the adverse impact compliance with precincts lines in the DOJ Plan's 9 split counties will have on its overall and average deviation percentages.

Another justification for the difference is that the constitutional violation being remedied here is not one-person, one-vote. No one has contended the 1992 Plan, with its .93% overall deviation, and .35% average deviation was unconstitutional in that regard. Because the district court was not charged with curing any unconstitutional deviation, *Upham v. Seamon* would arguably preclude any gratuitous changes to a district just to impove the population deviation. *See generally, Johnson v. Miller*, 929 F.Supp. at 1563 n.84.

The Court Plan achieved an overall population deviation percentage below any constitutionally viable alternative plan. Appellants' contention the *de minimis* overall and average deviations achieved by the Court Plan violate the one person, one vote principle announced in *Reynolds v. Sims*, 377 U.S. 533, is contrary with the position the ACLU took in the district court. At the remedy hearing, their counsel argued that Georgia's policy of maintaining the integrity of political subdivisions would justify even a .93 percent overall deviation:

> It might well be that [the] principle of *maintaining the integrity of those counties* articulated . . . and justified in the record *would excuse the deviations of . . . .9 percent*. I suppose we are suggesting that it would because we are presenting this plan as one we think *would be acceptable*.

R.Tr. 283-284 (emphasis added). The DOJ also endorsed the ACLU sponsored plans with overall deviations in excess of .93 percent. At the hearing, the DOJ contended such deviations "comply with the . . . constitution and [VRA]." U.S. Brief on Remedy, R. 348, at 1-2; R.Tr. 414, 421-422.[74]

In contrast, the Court Plan reduced the overall deviation Appellants argued were acceptable by almost two-thirds—to .35 percent. The district court amply justified even that slight deviation by reliance on Georgia's primary districting principle of maintaining the integrity of its political subdivisions, a districting principle the ACLU Appellants acknowledged would justify this kind of *de minimis* deviation. R.Tr. 283-284. *Karcher v. Dagget*, 462 U.S. 725 (1983), often cited for the principle of not permitting a *de minimis* population deviation in congressional plans, does in fact acknowledge that:

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the core of prior districts, and avoiding contests between incumbent[s].

Id. at 740.

The DOJ's Illustrative Plan has little probative value as a one person, one vote benchmark for this case. First,

---

[74] In their opening brief, the DOJ concedes the ACLU Plans would have to be "modified". DOJ Brief at 16-17, n.8. The DOJ never made that concession in the court below. Moreover, those modifications would necessarily mean more split counties and precincts so to increase the amount of population within the district manipulable by census block where deviations can be lowered.

the DOJ did not present the plan at the remedy hearing when the court directed all proposed plans be disclosed. Second, the plan did not respect Georgia's voting precincts, allegedly because precinct line information was not a part of the DOJ computer's programming. DOJ Brief, 19. Instead, the DOJ drew districts at the census tract level, while the Court Plan went to extraordinary lengths to honor this fundamental traditional districting principle by respecting precinct lines wherever possible.

The DOJ makes light of both its late submission, and its failure to honor precinct lines. The fact it did not follow precinct lines in the nine most populous urban counties (Cobb, Gwinnett, Fulton, DeKalb, Bibb, Fayette, Clayton, Cherokee, Muscogee), all of which were split, means that untold hundreds of thousands of voters are placed in split precincts by the DOJ's plan.[75]

Given all that is at stake, and the urgent need for finality in this matter, it is simply not enough to assure this Court that a lately proposed plan, which was not presented for scrutiny at the remedy hearing, can be "refined" on remand to comport with Georgia's right to have precinct lines respected. The issue is moot at this juncture since the DOJ never "refined" its plan before the Court Plan was implemented and this appeal was taken. The record is devoid of any evidence to prove the highly implausible assertion that a better deviation could have been achieved if precinct lines were respected.[76]

---

[75] For example, the DOJ divided Bibb County between *three* different congressional districts in order to maximize the minority population excised from the City of Macon in Bibb County for inclusion in the Eleventh District.

[76] As the district court noted, it was forced to actually split a few precincts to achieve a *lower* deviation in some districts where it deemed the deviation to be unacceptable. *Johnson III*, 922 F. Supp. at 1562. Reuniting the substantial number of split precincts in densely populated urban areas can only increase the DOJ plan's deviation.

CONCLUSION

For all of these reasons, the Appellees request the Court affirm the district court's order and plan, and dismiss this appeal.

Respectfully submitted,

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September, 1996

(10) (10)

Nos. 95-1425; 95-1858

Supreme Court, U.S.
FILED
SEP 18 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

LUCIOUS ABRAMS, JR., et al., and
THE UNITED STATES OF AMERICA,

Appellants,

v.

ZELL MILLER, PIERRE HOWARD
AND LEWIS MASSEY,

Appellees,

and

DAVIDA JOHNSON, et al.,

Appellees.

On Appeal From The United States District Court
For The Southern District Of Georgia

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QUESTIONS PRESENTED

I. Whether the district court abused its discretion or deviated from the constraints of *Upham v. Seamon* in adopting the redistricting plan here.

II. Whether the remedial plans advocated by appellants are mandated by Section 2 principles.

III. Whether the slight population deviation in the court's plan is within constitutional limits.

IV. Whether the district court's remedy was violative of Section 5 of the Voting Rights Act.

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I. STATEMENT OF THE CASE.

A. Proceedings Below.

Plaintiffs filed their complaint challenging Georgia's eleventh congressional district on *Shaw* grounds on January 13, 1994. The Department of Justice and several voters represented by the ACLU also sought, and were granted, permission to intervene. A trial on the merits was held July 21-28, 1994, in Savannah, Georgia. The district court entered judgment on September 12, 1994, in favor of plaintiffs, with Judge J.L. Edmondson dissenting.

A notice of appeal was filed by the Governor, the Lieutenant Governor and the Secretary of State on September 14, 1994. The private intervenors and the Department of Justice subsequently filed notices of appeal as well. This Court noted probable jurisdiction of all appeals, and the cases were heard on April 19, 1995. On June 29, 1995, this Court issued its opinion affirming the judgment of the district court and holding that the eleventh congressional district was unconstitutional because it was predominantly the product of racially segregative motivations. *Miller v. Johnson*, 132 L.Ed.2d 762 (1995).

On July 7, 1995, the Governor of the State of Georgia issued a call for a special session of the General Assembly to consider remedial reapportionment legislation. Pursuant to that call, the General Assembly was in session from August 14, 1995 to September 12, 1995. While the General Assembly was able to enact new plans for the House and Senate that were necessary because of similar constitutional defects in those plans, the legislature was unable to agree upon a new congressional reapportionment plan.

On August 22, 1995, the district court held a hearing to determine how best to proceed in resolving the issue of remedy. Subsequently, in preparation for its own adoption of a remedial reapportionment plan, the district court requested that the parties submit various redistricting proposals. (Orders of October 17 & 20, 1995) Pursuant to these requests, both the plaintiffs and the *Abrams* intervenors submitted several proposals. Also, defendant Thomas B. Murphy, the Speaker of the Georgia House of Representatives, submitted a proposal. Neither the United States nor any of the defendant State executive officers (the Governor, the Lieutenant Governor and the Secretary of State) submitted proposals. These State defendants believed it inappropriate for them to submit such proposals since, under State law, they had no authority to exercise this legislative function. (R. Vol.12, 343)

Shortly after this Court's decision, the plaintiffs moved to amend their complaint to also challenge the second congressional district, contending that it was borne of the same type of illegal racial gerrymander as the eleventh district. The district court proceeded on October 30, 1995, to receive additional evidence regarding the second district. The State's defense was necessarily a limited one in light of this Court's previous ruling, the earlier findings of the district court, and the facts pertaining to the second district. The United States did not contest plaintiffs' claim that the second district was unconstitutional.

After receiving additional evidence on the second district, the trial court moved immediately into the remedy hearing, which was concluded on October 31, 1995.

All parties were allowed at the hearing to introduce what additional evidence they desired on the issue of remedy, to advocate their plans and suggestions, and to cross-examine the witnesses of the opposing parties.

On December 1, 1995, the district court issued an order finding the second district unconstitutional. (U.S. J.S. 30a) On December 13, 1995, the court issued its order adopting a remedial reapportionment plan to be used in the 1996 elections. (U.S. J.S. 1a) Both the United States and the *Abrams* intervenors filed notices of appeal. On February 6, 1996, this Court denied the *Abrams* intervenors' motion for a stay, and the same motion was again denied by this Court on June 7, 1996. Probable jurisdiction was noted on May 20, 1996.

B. Statement of Facts.

The 1994 Trial of the Eleventh Congressional District and the District Court's Findings. According to the 1990 census, Georgia was entitled to an increase in its number of representatives from ten to eleven. Legislative committees in both the Georgia House and Senate began the reapportionment process early in 1991 by adopting guidelines for new redistricting plan. (Jt. Exs. 9, 10) These guidelines required, among other things, that no plan considered or adopted should be permitted to "dilute minority voting strength." *Id.* From the outset, the views and the dictates of the Department of Justice played a decisive role.

The reapportionment process is well documented in the district court's 1994 opinion. Some of the pertinent findings include the following:

One of the "third party" redistricting proposals submitted to the legislature in 1991 would later earn the ominous moniker, "the max-black plan." That plan, created by Ms. Kathleen Wilde, then an attorney with the American Civil Liberties Union ("ACLU") and in her capacity as advocate for the Black Caucus of the Georgia General Assembly, provided for three "majority-minority" congressional districts in Georgia: the Second, Fifth and Eleventh. . . . In contrast, the then existing congressional plan had only one majority-minority district: the Fifth. *Johnson v. Miller*, 864 F. Supp. 1354, 1360-61 (S.D.Ga. 1994).

. . . .

The Court realizes that the motivations of the State of Georgia are the legally relevant motivations in this case, and not those of the ACLU or the DOJ. We consider the behavior of the latter parties, however, because it is inextricably linked to the redistricting decisions of the General Assembly. The actions of the legislature have much less significance when removed from their context. *Id.* at 1361-62.

. . . .

It is unclear whether DOJ's maximization policy was driven more by Ms. Wilde's advocacy or DOJ's own misguided reading of the Voting Rights Act. This much, however, is clear; the close working relationship between Ms. Wilde and the Voting Section, the repetition of Ms. Wilde's ideas in Mr. Dunne's objection letters, and the slow convergence of size and shape between the max-black plan and the plan DOJ finally precleared, bespeak a direct link between the max-black plan formulated by the ACLU

and the preclearance requirements imposed by DOJ.

Succinctly put, the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment. *Id.* at 1368.

. . . .

The amount of evidence of the General Assembly's intent to racially gerrymander the Eleventh District is overwhelming, and practically stipulated by the parties involved. *Id.* at 1374.

. . . .

Any attempt to explain the Eleventh District as anything but a far-flung search for black voters utterly collapses under the weight of direct evidence. One need only review DOJ's objection letters and our findings of fact to see that DOJ spent months demanding purely race-based revisions to Georgia's redistricting plans, and that Georgia spent months attempting to comply. The testimony at trial reflects this sorry process, and it is compelling. *Id.* at 1377.

The district court reviewed evidence concerning racial voting patterns, "racially polarized voting," and the like. It concluded in this regard:

> All that is clear from the evidence is that some degree of vote polarization exists, but not in alarming quantities. Exact levels are unknowable. . . .
>
> In addition, we also find a significant degree of crossover voting in Georgia and the Eleventh District, with white voters slightly more willing to vote for black candidates than

black voters for white candidates. Rpt. of Dr. Katz, Table 2. The average percentage of whites voting for black candidates ranged from 22% to 38%; the average percentage of blacks voting for white candidates ranged from 20%-23%. Black and black-preferred candidates in Georgia have achieved many electoral victories in local and state-wide elections and have received significant – occasionally overwhelming – support from both black and white voters within the Eleventh Congressional District. . . . [T]he very lack of solid evidence of black vote cohesion or rampant bloc voting, i.e., vote polarization, contributes to our conclusion that the current Eleventh District was not an appropriate section 2 remedy. *Id.* at 1390-91.

Based on all the evidence, the court made the following conclusions of law:

> In sum, the current districting plan is not reasonably necessary to comply with sections 2 or 5 of the VRA. Since no compelling state interest other than VRA compliance is evident, the plan fails strict scrutiny under the Fourteenth Amendment. We finally conclude and declare that Georgia's Eleventh Congressional District is unconstitutional in its current composition. The State of Georgia is hereby barred from using it in future congressional elections. *Id.* at 1393.

All of the district court's essential findings were affirmed by this Court in *Miller v. Johnson I*. Finding that strict scrutiny was not satisfied, this Court agreed that the plan was unconstitutional.

The Evidence and Findings Concerning the Second Congressional District. Georgia's second congressional district

suffered the same ACLU-DOJ dictated origins as did the eleventh district struck down in *Miller I*. In its order of December 1, 1995, the trial court accordingly found that the second district was also unconstitutional, a finding unopposed by the Department of Justice.[1] (U.S. J.S. 30a-38a) The Court found as follows:

> After a trial on the merits and in the light of *Miller v. Johnson*, 115 S.Ct. 2475 (1995), we find and conclude, that race, namely, the intention to create a congressional district in which black persons would be a majority of the voting age population, was the overriding and predominant factor motivating the placement of the Second District's boundaries. We find that the boundary line for the district was consistently drawn to keep potential black voters in the district and to keep potential white voters out of the district. The district was drawn to segregate voters according to their race; so, it is an unlawful district.
>
> Twelve of the Second Congressional District's thirty-five counties were split, and to draw the Second Congressional District as it is now also required the splitting of twenty-eight precincts. In addition, the boundary of the Second District splits the cities of Columbus, Macon, Albany, Manchester, Roberta, Byron, Centerville, Warner Robins, Ft. Valley, Perry, Cordele, Leesburg, Moultrie, and Valdosta.

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[1] None of the private intervenor-defendants lived in the second district, and they thus lacked standing to participate in the district court's determination of that issue under *Hays v. Louisiana*, 132 L.Ed.2d 635 (1995).

Before 1992, the second district included no portions of the city of Columbus or portions of the City of Macon. Before 1992, the Second Congressional District contained no split counties.

We find that the sole reason for splitting precincts was racial and that the predominant reason for splitting the counties and cities was racial as well. . . .

Linda Meggers, Director of Reapportionment Services for the Georgia General Assembly, was qualified as an expert witness. She testified that it was not feasible to create a majority-minority district in the Second Congressional District without including the black population centers in Columbus and Muscogee County, Albany and Dougherty County, and Macon and Bibb County. She further testified that, in drawing the Second Congressional District, she – we find her to have been the chief draftsperson for the District – followed the "Max-Black Plan," as espoused by the ACLU, to the same degree to which she followed it in drawing the Eleventh Congressional District. The Max-Black Plan's purpose was to maximize black voting strength in certain congressional districts by making the racial composition of those districts the overriding consideration in their design. (U.S. J.S. 33a-35a)

In conclusion, the trial court held that, while the second district differed in some respects from the eleventh, those differences were "not significant enough to make the second district constitutional." (U.S. J.S. 36a)

> Nothing in the State's argument changes the fact that the General Assembly was predominantly motivated by race in its drawing of the Second Congressional District. The sections of the district's boundary that were drawn for racial reasons are substantial in terms of both distance and population affected. . . .
>
> Because race was the overriding and predominant motivating factor in designing the Second Congressional District, the district can be upheld only if it survives strict scrutiny. (U.S. J.S. 37a)

The trial court found no compelling justification for the race-based districting of the second district, just as it, and this Court, had found with the eleventh district. *Id.* at 37a-38a.

The Relief Ordered by the District Court. The State's existing plan was not unconstitutional in just one or two small respects. It suffered major distortions because of the DOJ's illegal actions. Furthermore, because the second district was located in south-west Georgia and the eleventh district was located in east-central Georgia, the district court was required to fashion a remedy to an existing plan that involved unconstitutional district lines located literally across the entire State.

At the remedy hearing, Ms. Linda Meggers (the director of the State's Reapportionment Office whose testimony has been cited both by the district court and this Court earlier) testified about the origins of any impetus to draw a plan with two majority black districts. She testified that, whether it be two majority black districts or three, the perception by the State that that should be done

originated from the expressed demands of the Department of Justice. (Tr. 430-33)[2] Ms. Meggers further testified that – unless race was the predominant motive that trumped other considerations – a second majority/minority district could not be drawn.

> Q: Consistent with your understanding of the decision in *Miller v. Johnson* and the Voting Rights Act, a second minority/majority district was not, at least in your opinion, possible?
>
> A: Not one that says 50 percent on the [VAP] in 1990, no, sir, it was not. (Tr. 434-35)

To the extent that the State had at one time been motivated to draw two – and even three – majority-minority districts, there was other uncontradicted evidence that that was the product of the perceived need to do so in order to satisfy the DOJ's demands. In addition to the 1994 evidence and the findings of the district court, two additional legislators testified on this issue at the 1995 hearing. One of them, Robert Hanner, was the Chairman of the House Reapportionment Committee. He described a meeting that he and other Georgia representatives had prior to the initial reapportionment where John Dunne spoke. At the time, Dunne was the senior-most DOJ attorney for civil rights:

> Q: Can you tell us what you recall about that meeting?
>
> A: From the seminar or the meeting in Baltimore we came away thinking we had to

[2] All "Tr." cites in this brief are to the October 30-31, 1995, hearing.

> have a second majority black district in Georgia.
>
> Q: Was the standard, if it was technically possible?
>
> A: Yes, we had to have one. (Tr. 74-75)

The *Abrams* intervenors' plans – i.e., the ACLU plans – were introduced at the remedy hearing through the testimony of Selwyn Carter, an employee of the Southern Regional Council, whose job was to draw and advocate reapportionment plans "across the South." (Tr. 294) Mr. Carter was candid regarding the role of race in his work:

> My basic goal in preparing [Georgia congressional] plans was to try to show it is possible to develop a constitutional redistricting plan which is fair to both black and white voters in the State of Georgia and comply with this Court's ruling in *Miller v. Johnson. To show that it is possible to draw a plan in which African-American voters comprise approximately 50 percent of the voting age population of a district and at the same time show that race was not a factor.* (Tr. 296) (emphasis added)

Furthermore, Mr. Carter acknowledged that *his effort was designed to make as few changes in the unconstitutional second and eleventh congressional districts as he could.* (Tr. 298) While testifying on direct that, in his own opinion, he had not used race as a "predominant" factor in drawing the ACLU's districts, he further acknowledged his operating view that majority-minority districts *had* to be drawn where they could be:

> I do believe as a result of *Thornburg v. Gingles*, the State has an obligation to draw a district that

is fair to minority voters if the geographical distribution of voters is such that such a district can be drawn. (Tr. 325)

Mr. Carter could not say that the Voting Rights Act required the kind of majority-minority districts that he had drawn and that were advocated by the *Abrams* intervenors: (Tr. 324-27, 330)

Q: . . . [T]here isn't a single plan, ACLU, black caucus or your organization, that you can say under oath is required by the Voting Rights Act in terms of the second minority-majority district?

A: I believe that we are in a gray area of the law. It used to be clear a couple of years ago, and it is not as clear now as it used to be.

. . . .

Q: But you would agree that there could still be clear cases wherein a minority district would be required by the Voting Rights Act?

A: I believe that's true. (Tr. 332-33)

Mr. Carter's intentional inclusion of a second majority black district in his plans for Georgia was admittedly a political response to his client, the Georgia legislative black caucus.

Q: Mr. Carter, you told any number of people during [the 1995 Special Session] that to be politically acceptable to the black caucus, there had to be a second Congressional district that was majority black?

A: Yes, sir.

Q: With regard to whether it was required by the Voting Rights Act or not, for the black caucus to support any plan, it had to include a second majority black district?

A: I do not recall making any reference to the Voting Rights Act.

Q: But in your own mind, that was the reality?

A: Yes. In the advice and assistance that I provided to the black caucus, all the plans which I either drew or which I recommended that the black caucus support contained two minority-majority congressional districts. (Tr. 330-31)

Based on the wealth of evidence before the district court from the 1994 trial and the 1995 proceedings, the court proceeded to craft its own plan, the basis of which is described in a painstaking, thirty-three page decision. Because of the pervasive unconstitutionality that infected the existing redistricting plan in this case, the court concluded that that plan did not provide the kind of remedial guidance found in a typical one-person/one-vote case:

> At first glance it appears that, in remedying Georgia's constitutionally infirm congressional districting plan, we are faced with the same task as the *Upham* court, which would entail making only those changes necessary to bring the current plan into constitutional compliance. However, this Court's remedial task differs from that of the *Upham* court's because Georgia's current plan was not the product of Georgia's legislative will. Rather, the process producing Georgia's current plan was tainted by unconstitutional DOJ interference. *See Johnson I*, 864 F. Supp. at

> 1367-68. By virtue of its unconstitutional origin, Georgia's current congressional plan cannot form the basis for the remedy we now construct because it does not represent the goals of Georgia's historic policies nor the state legislature's true intent. (U.S. J.S. 4a)
>
> . . . .
>
> Using the current plan as a basis for the remedy would, in effect, validate the DOJ's constitutionally objectionable actions. Thus, we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals. (U.S. J.S. 5a)

The court acknowledged its duty to adhere to one-person/one-vote requirements, and to then ascertain, to the extent that it could, the traditional districting considerations evidenced by the Georgia General Assembly. (U.S. J.S. 7a-8a) There was abundant evidence that Georgia had a strong historical interest in maintaining its political subdivisions intact. (U.S. J.S. 8a-10a) In fact, during the State's entire two hundred year history, whole counties have always been the basis of its government organization.

> Georgia's strong historical preference for not splitting counties outside of the metropolitan Atlanta area, as well as other unique factors, account for some of our plan's deviation. . . .
>
> Georgia has preferred to split counties only in the Atlanta area where division was necessary because of Atlanta's dense population relative to other areas of the state. . . . The product of the Court's efforts is a lower overall deviation than Georgia's 1982 and 1992 plans.

> However, maintaining political subdivisions (counties) cannot alone justify less than perfect deviation in a court plan. . . . We therefore considered splitting counties outside of the Atlanta area, but other factors unique to Georgia militated against it. (U.S. J.S. 8a-10a) (footnotes and citations omitted)

The court went on to discuss other historical redistricting criteria in Georgia, and the court explained how it decided where to locate Georgia's new eleventh district:

> We drew upon Georgia's 1972 plan and 1982 plan, as well as the first plan enacted in 1992, to determine how the legislature typically maintains district cores from one plan to another. Our first hurdle was where to locate the new Eleventh District. Since significant population growth is occurring in the Atlanta area, it follows that the new district would be created where future growth is anticipated. Carving the new district where growth is projected allowed us to include fewer counties within the district, consequently enabling us to better maintain district cores.
>
> We placed the new Eleventh District in the Northeast Atlanta corridor out to the northeast Georgia state line. The Eleventh District now contains counties which are becoming more urban with the population growth, notably Walton County and Newton County. . . . The Eleventh also contains the Athens-Clarke County area which has become a metropolitan area in its own right, and locating it in the Eleventh is consistent with the new Eleventh's urban/suburban flavor. *Id.* at 12a-14a. (U.S. J.S. 12a-14a)

Georgia's past congressional redistricting plans reflected what the witnesses described as the four "corner" districts. The court found this to be a meaningful factor:

> The four "corner" districts include: 1) the southeastern coastal district, comprising the coastal counties and the other counties most closely related to them; 2) an agrarian district in southwest Georgia, prominent for its peanut production; 3) the northwestern corner, known for its carpet production and isolated from the northeast Georgia counties by mountains; and 4) the northeastern corner, identified by its preeminent position in poultry production. Maintaining these districts is consistent with the community of interest factor approved by the Supreme Court. (U.S. J.S. 16a-17a)

To the extent possible, the court also sought to follow the General Assembly's historic continuation of "district cores" from one plan to another.

> The 1972, 1982, and the three 1992 plans that passed the legislature evidence this legislative preference. Our remedy bears a striking resemblance to these earlier plans, especially in the rural districts such as the First, Second, Eighth, and Ninth. (U.S. J.S. 17a-18a)

Finally, the court discussed its continuation of the urban district in the Atlanta area, which was majority black, and which had existed since 1972. Race was considered by the court as a factor insofar as it determined that "the legislature would have considered it in maintaining [this] one majority-minority district." (U.S. J.S. 17a) The court also noted some lesser interests, and

accorded them appropriately lesser weight. For example, there was some history in Georgia of drawing district lines so that incumbents would not be pitted against one another under a new plan. "The court considered this factor, but since it is inherently more political than factors such as communities of interest and compactness, we subordinated it to the other considerations." (U.S. J.S. 18a)

SUMMARY OF ARGUMENT

Compliance with Upham v. Seamon. The court acted well within its discretion in adopting the plan that it did. The court fashioned a remedy that reflected Georgia's historical districting considerations to the extent possible, consistent with all constitutional requirements. While appellants contend that the remedy should have more closely resembled the 1992 plan, they ignore the fact that that plan was unconstitutional both in its overall purpose and in its detailed design. The 1992 plan was essentially the illegal "black max" plan that was forced upon the State by the appellants during the Section 5 process in 1991-1992.

Section 2. The district court correctly found that Section 2 did not mandate the creation of another black majority district. To have drawn such a district would have required that race predominate over traditional, nonracial districting considerations. Moreover, the record in this case contains nowhere near the kind and quality of evidence that would be necessary to show that Section 2

was violated by having a single black majority district in Georgia's plan.

Population Equality. Appellants should be foreclosed from advancing their claim of a one-person/one-vote violation in this Court because it is contrary to the position they advocated below. Furthermore, the minor deviation here was fully justified by the district court's efforts to accommodate legitimate, non-discriminatory districting considerations like preserving traditional district cores and maintaining political subdivisions intact.

Section 5 and Retrogression. By its terms, Section 5 has no bearing in this case. Appellants acknowledge that that statute does not apply to a court-ordered plan. The appellants' argument that the statute's substantive restrictions should nevertheless be imposed on the district court is an argument without precedent. It is little more than an effort to try to preserve as much of the illegal plan that appellants forced upon the State during the original reapportionment process.

ARGUMENT

I. THE DISTRICT COURT NEITHER ABUSED ITS DISCRETION NOR DEVIATED FROM THE CONSTRAINTS OF *UPHAM V. SEAMON* IN ADOPTING THE REDISTRICTING PLAN HERE.

A. It Was The Duty Of The District Court In This Case To Impose A Remedy That Eliminated Entirely The Unconstitutional Gerrymander That Was Georgia's 1992 Congressional Districting Plan.

For a half century now – since the initial remedy decision in *Brown v. Board of Education,* 349 U.S. 294 (1955) – this Court has made clear the equitable duty of a district court when devising a remedy for a violation of the Fourteenth Amendment. That duty is to devise a remedial plan that completely eliminates all vestiges of the government's unconstitutional action. As this Court unanimously described this burden in *Green v. County School Board of New Kent County,* 391 U.S. 430, 437-38 (1968), the defendant has "the affirmative duty to take whatever steps might be necessary to convert to a [nondiscriminatory] system in which racial discrimination would be eliminated root and branch." When the defendants are either unwilling or unable to voluntarily adopt a plan that satisfies this burden, it is then the duty of the district courts to impose such a remedy. *Green v. County School Board of New Kent County, supra; Swann v. Charlotte-Mecklenburg Board of Ed.,* 402 U.S. 1, 15 (1971):

> If [the defendants] fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's

equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in inequitable remedies.

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Swann, supra* at 15 (citations omitted).

This basic remedial principle remains unchanged. As the Court recently held in *Freeman v. Pitts*, 503 U.S. 467 (1992):

The objective of *Brown I* was made more specific by our holding in *Green* that the duty of a former *de jure* district is to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 486 (citation omitted).

The broad constitutional duties here are no different. The obligation of the district court to impose a complete remedy is the same in this case as in *Freeman, Swann,* and this Court's other constitutional decisions. Pervasive violations of the equal protection clause having been found to infect Georgia's statutory congressional reapportionment plan, the district court was bound to impose a remedy that fully, completely and totally eradicated the racial gerrymander of the old plan, "root and branch."

B. Particularly In Light Of The Pervasive Consequences Of The Constitutional Violations Here, The District Court Fully Complied With The Equitable Requirements Of *Upham v. Seamon.*

Appellants complain that the extent of change reflected by the district court's remedy, when the new plan is compared to the original plan, exceeds the limits permitted a court in equity. But in advancing this argument, appellants point to no finding of the district court that might have been clearly erroneous. Rather, they simply proceed on the assumption that any plan that contains significant changes from the old plan – the *unconstitutional* old plan – must automatically fail to be a "minimum change" plan and must therefore violate the constraints of *Upham v. Seamon*, 456 U.S. 37 (1982), *White v. Weiser*, 412 U.S. 783 (1973), and other such cases. Appellants' assumption is misplaced.

The eleventh congressional district contained parts of three major urban counties: Chatham, Richmond and DeKalb. The great bulk of the population of the district came from these three counties. Each was split along the kind of racial lines that this Court found unconstitutional. Because race was proved to be the overall driving force in the eleventh congressional district – dictating its broad architecture as well as individual county splits – and because the three major population areas in the district had been split on the basis of race, any remedial plan that eliminated these constitutional violations necessarily looks different than the old plan. This the appellants ignore.

Moreover, while the remedy necessitated by the eleventh district alone would be extensive, the district court also had to address the unconstitutional second district. Any remedy for the second district, too, necessitated significant changes in Georgia's congressional plan. Twelve separate counties in the second district were split, all on the basis of race. These race-based splits involved every significant city in the second district. The boundary of the district weaved in and out of counties in order to pick up even minor black populations in small towns, all to increase the black percentage in the district. (U.S. J.S. 33a-35a)

The court's remedial plan necessarily differed in appearance from what had been forced upon the State of Georgia by the ACLU and the Department of Justice during the Section 5 process in 1991 and 1992. Had the court followed the path advocated by appellants, and adopted a plan patterned on the existing, unconstitutional plan – one that simply "ironed out" the most egregious contortions – the court would have been continuing the fundamental constitutional violations that were found here.

Indeed, when one considers that *every major population center in Georgia* had been split on the basis of race by the ACLU/DOJ dictated plan, it should be obvious that any effort to remedy that race-based districting would have to look very different than the old plan. With the bulk of the State's population involved in racial gerrymandering, the elimination of that gerrymandering inevitably necessitated a significant redrawing of the lines.

The *Upham* rule does not fit the circumstances of this case as it did the original Texas litigation where the case arose. That is true because the plan adopted by the Georgia General Assembly in 1992, did not express the policy choices of the State. In *Upham*, there was nothing wrong with the plan as a whole. There had simply been a Section 5 objection to a small feature of the plan. Where the district court erred in *Upham* was to redraw great parts of the plan that were unaffected by the Section 5 objection.

Here, the case is entirely different. The legislative plan was dictated largely by the DOJ's Section 5 unit. Therefore:

> Using the current plan as the basis for the remedy would, in effect, validate the DOJ's constitutionally objectionable actions. Thus, we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals. (U.S. J.S. 5a)

Appellants do not challenge this finding as clearly erroneous, nor could they based on the record in this case. That should be dispositive of their appeal on this issue.

C. The District Court Made Every Possible Effort To Discern Georgia's Non-discriminatory Districting Interests And To Fashion Them Into A Remedy Consistent With Federal Requirements.

Appellants' complaint that the district court ignored Georgia's traditional districting principles, thus violating *Upham* and *Weiser*, also disregards what the district court actually did in this case. The State's traditional districting principles were reviewed by the trial court in detail.

These principles were then followed to the extent possible in fashioning the remedy. (U.S. J.S. 12a-18a)

In discerning these historical redistricting considerations, the court "drew upon Georgia's 1972 plan and 1982 plan, as well as the first plan enacted in 1992, to determine how the legislature typically maintains district cores from one plan to another." (U.S. J.S. 13a) Utilizing the traditional district cores, the court then carved out the new eleventh district that Georgia received because of its population increase. Because of "significant population growth" in the Atlanta area, the eleventh district was started there. This growth allowed the court "to include fewer counties within the district, consequently enabling us to maintain district cores." (U.S. J.S. 13a) The eleventh district also traversed counties outside of Atlanta "which are becoming more urban with the population growth," and it also "contains the Athens-Clarke County area which has become a metropolitan area in its own right, and locating it in the Eleventh is consistent with the new Eleventh's urban/suburban flavor." *Id.* Appellants do not take issue with a single one of the facts found by the court in its drawing of this district as being based on historical Georgia districting principles.

Furthermore, the court put a great deal of emphasis on maintaining political subdivisions intact, and Georgia's counties in particular. It did so because of "Georgia's strong historical preference for not splitting counties outside of the metropolitan Atlanta area." *Id.* at 8a. Appellants belittle the court's effort to maintain the integrity of Georgia's cities and counties. For example, the DOJ points out that, for a few years under one

congressional plan in the 1970s, one non-Atlanta County (Whitfield County) out of Georgia's 159 counties was split between two congressional districts. (U.S. Brief, p.18) But again, appellants make no challenge to the court's finding as clearly erroneous.

Moreover, one cannot look at the facts without coming to the same conclusion that the district court did. Since Georgia was first a State, its government has been organized on the basis of counties. As long ago as the Constitutions of 1777, 1789, and 1798, for example, the legislature was invariably elected by the electors in these units of local government. *See generally,* W. McElreath, A Treatise on the Constitution of Georgia: History, Documents, and Construction (1912). Georgia's apportionments – both for Congress and for its own House and Senate – continued to be based exclusively on compact and contiguous groupings of intact counties until a county split was first required to comply with *Baker v. Carr,* 369 U.S. 186 (1962). Even then, the absolute minimum county splitting occurred, that being limited (with one temporary exception) to county splits that had to be made in the Atlanta area because Fulton County's population exceeded the population of a single congressional district. (U.S. J.S. 8a-10a, 15a-16a)

In maintaining Georgia's counties intact, in trying to maintain the traditional cores, in continuing Georgia's historic districts in the "four corners" of the State, and otherwise, the district court made every reasonable effort to put itself in the place of what the General Assembly would have done in 1991-92 *had it not been for the illegal excesses of the DOJ.* Appellants are unable to show how the district court might have abused its discretion in this

regard or been clearly erroneous in any fact that it relied upon.

Appellants' real complaint is a philosophical difference with this court's *Miller v. Johnson I* decision. They contend that anything is an abuse of discretion that does not preserve as many majority-minority districts as possible. They are arguing "black max" once again, reined in from three districts to two only by virtue of this Court's first decision. Their contentions are not based on the equitable rules that govern a court's development of a redistricting remedy.

D. No Alternative Plan Was Offered By The Intervenors That Was A Good Faith Effort To Remedy The Constitutional Defects That Existed.

Appellants correctly state that they offered "remedial plans" to the district court that would have changed the old plan less than did the court's ultimate remedy. But appellants completely failed to show that their plans would have remedied the constitutional defects found by the district court and this Court. To the contrary, the remedial plans offered by appellants (and the incumbent congressional representatives, acting as amici), reflect much of the same architecture and line drawing difficulties that led to the declarations of unconstitutionality.

The *Abrams* intervenors' plans were introduced exclusively on the testimony of Selwyn Carter. His own testimony makes clear that his efforts were not directed at remedying the constitutional violations found in this case. To the contrary, he had two admitted objectives. The first was to draw a plan with two majority black districts.

"[A]ll the plans which I either drew or which I recommended that the black caucus support contained two minority-majority congressional districts." (Tr. 330-31) His "basic goal" in preparing these plans was to show "it is possible" to create a plan with such districts "in which African-American voters comprise approximately 50% of the voting age population." (Tr. 296) Secondly, Mr. Carter admitted that he tried to maintain the "districts with as little change as possible," making only those changes that he believed would correct the constitutional defects. (Tr. 298)

These admissions by Mr. Carter – as well as what is plainly apparent from merely looking at the ACLU's remedial plans – is fatal to their appeal. By their own admission, the *Abrams* intervenors did not advocate a remedy that either (1) sought to adhere to Georgia's traditional district considerations, or (2) sought to do what the General Assembly would have done in 1991-92 in the absence of the illegal actions of the DOJ. Instead, the *Abrams* intervenors' entire strategy is simply to try to hold on to as much of the illegal plan as they can, the plan that they successfully forced upon the legislature initially.

The Department of Justice relies on its so-called "Illustrative Plan." This plan should not even be considered by this Court on appeal. The DOJ stood mute when the trial court – on two separate occasions – solicited remedial proposals from the parties. (See Orders of October 17 & 20, 1995) At the remedy hearing itself on October 30-31, 1995, the DOJ once again declined to submit a plan.

It was not until November 22, 1995 – after the evidence was closed – that the DOJ ever submitted its "Illustrative Plan". This exhibit was filed under the pretense of being a "response" to another plan.[3] (R. Vol. 12, 369) It would appear – just as with the *Abrams* ACLU plans – that the DOJ's belated plan was simply an effort to preserve as much of the old, unconstitutional plan as it could. Two majority black districts are the *sine qua non* of the DOJ's plan. Was racial segregation of the voters 50% of the motivation behind that plan? 75%? or 90%? One cannot say for sure because the DOJ's late-submission tactic was designed to insulate its demographer from cross-examination.

The United States should not be allowed to use such tactics to immunize its submissions from the same kind of searching examination given to the other parties' proposals. Even without such an examination, though, the DOJ's purposes seem apparent. As the district court noted, the DOJ's "plan split numerous counties outside of

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[3] After the hearing, the court issued an order directing plaintiffs' counsel to submit an additional map that was to be identical to one of plaintiffs' earlier plans, but with even smaller population deviations. (Order of November 9, 1995) The plaintiffs did that, and the DOJ then used that submission as an excuse to file its "Illustrative Plan," though the DOJ plan had nothing to do with the court's order or the slight revisions to the plaintiffs' remedy. Rather, it was an obvious effort to place into the record the kind of plan that the DOJ had earlier disavowed any intention of submitting or advocating, and which should have been submitted – if at all – at the remedy hearing. The State defendants promptly objected to the DOJ's action. (R.Vol. 12, 374)

the metropolitan Atlanta area, apparently for racial reasons." (U.S. J.S. 8a, n.4)

II. THE REMEDIAL PLANS ADVOCATED BY APPELLANTS ARE NOT MANDATED BY SECTION 2 OR "VOTE DILUTION" PRINCIPLES.

A. The Record Is Devoid Of The Kind Of Evidence Necessary To Show A Section 2 Violation In This Case.

To say that the appellants' evidence of a possible Section 2 violation was skimpy is charitable. Given that they would have to show that the district court was clearly erroneous, their failure of evidence is fatal. In essence, they simply rely upon (1) the district court's judicial notice of Georgia's past history of segregation, and (2) some cobbled-together testimony concerning "racially polarized voting," which was substantially contradicted by other witnesses and rejected by the district court. Before a federal court might condemn a State's entire reapportionment plan as illegal under federal law, much more would surely be required.

Appellants pay no more than lip service to the statutory language that the "totality of the circumstances" be examined to ascertain whether federal law overrides State electoral choices. Appellants could not seriously suggest that their evidence touched upon the "totality" of the political process in the State of Georgia as it affects black voters. Politics – and race relations – are indisputably vastly more complex than the appellants would suggest.

Moreover, appellants lose sight of the fact that the nature of their Section 2 claim affects the weight of the evidence necessary to prevail. It is one thing to challenge at-large or multi-member district schemes as dilutive of minority voting. Assessing the at-large feature for its racial impact – and eliminating that feature from the electoral scheme if appropriate – is a much simpler and more direct task than assessing the relative impact of comparative single-member district schemes. This Court recognized the difference between such claims in *Johnson v. DeGrandy*, 129 L.Ed.2d 775, 788-89 (1994). While this Court has not yet articulated just what quantum of proof is necessary to satisfy the "totality of circumstances" burden in a single-member district case, it is telling that the Court has *never* yet found the evidence sufficient in any case where that claim has been advanced.

However heavy a challengers' burden should be, far more need be shown than appellants adduced here. Otherwise, the DOJ and the ACLU were right in their original "black-max" argument: With a minimal evidentiary showing, a State would be required to draw as many majority-minority districts as it can.[4]

[4] The DOJ is explicit in making this argument. They claim that a significant piece of "evidence" in showing the totality of the circumstances here is that the district court's plan has only one black majority district out of eleven. (DOJ Brief, p. 21) It is difficult to imagine a more circular argument.

B. The Evidence Concerning Racial Voting Patterns In Georgia Is Fatal To Appellants' Claim.

Appellants argue in this Court that "racially polarized voting" is so severe that black candidates cannot win. *In so arguing, they ignore the contrary findings of the district court from the first trial.* Those findings, of course, are binding on the present proceeding. They were findings essential to the first judgment, and that judgment was affirmed on appeal. No new evidence, since remand from this Court's decision, was introduced by appellants on this issue.

In addition, in relying on Dr. Lichtman's testimony as if it were an accepted fact, appellants ignore that his testimony was substantially contradicted. Dr. Joseph Katz evaluated Dr. Lichtman's data, and he found the inherent uncertainty in it enormous. To a reasonable level of statistical certainty, Dr. Lichtman's techniques showed almost nothing.[5]

The DOJ goes on to assert electoral "facts" that were proved by no evidence, and directly contradicted by substantial evidence. Using hypothetical "crossover voting" percentages, they conclude that a black candidate "would

[5] For example, instead of the precise correlations that Dr. Lichtman presented to the court, the data actually suggested huge ranges, many of them showing an impossible "minus" correlation. (See, e.g., Jt. App. 38-52) Wherever the "impossible" appeared in his calculations, Dr. Lichtman arbitrarily chose to characterize that data as having *absolute* racially polarized voting – i.e., no racial crossover. In fact, as Dr. Katz' testimony demonstrated, those figures illustrated no such thing, but rather the inherent unreliability of his techniques. See State Ex. 170.

likely be foreclosed from winning election in the court's Tenth District." (DOJ Brief, p. 27) This statement purports to be based on (1) the fact that that district has a black VAP of 34%, and (2) assuming crossover voting percentages similar to what the court found existed. What the DOJ fails to disclose is that those crossover percentages do not apply in each and every race. They are just an average, and they go up and down from one election to another. To insinuate that they are a static, inflexible rule, and that a black cannot win, is a serious distortion of the evidence.

In fact, appellants put up no evidence concerning the probability of black-preferred candidates winning. Only the State's expert, Dr. Katz, even addressed the likelihood of winning or losing, and it was his testimony that the district court necessarily relied upon for this point. (State Ex. 170, pp. 21-22 & Tab 5)[6] According to Dr. Katz, the probability of a black candidate winning in a black-white election in a district with 34% black registered voters would be substantial – nothing like the "impossibility" the DOJ misrepresents to this Court. *Id.*

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[6] The charts showing these probabilities were not included in the Joint Appendix prepared by appellants, although requested. Several of them are therefore reproduced in App. A hereto.

C. Unless Section 2 Were To Be Construed To Mandate "Proportional Districting," The District Court Correctly Concluded That A Second Majority Black District Was Not Required Here.

The trial court held that a second black district could not be constitutionally drawn here without violating the gerrymander prohibition of *Miller I* and *Shaw I*. According to the court, only if race were allowed to predominate over the traditional districting consideration of maintaining counties intact, could such a district be created because of the dispersion of minority population around the State. (U.S. J.S. 20a-24a)

While not quite claiming that that finding is clearly erroneous, appellants point to their various proposed plans to contend that an appropriate second black majority district could be drawn. But what appellants ignore is that, while such a district is technically feasible, race continues to play a heavy, predominant role in their favored plans. The *Abrams* intervenors' plans – those drawn by Selwyn Carter – were clearly predicated largely on the basis of race. They were, moreover, drawn for the express purpose of continuing the old, unconstitutional plan to the greatest extent possible. They were not appropriate remedies, and, as the court noted, they intentionally cracked counties on the basis of race to achieve their purpose. That would appear to be the same kind of trumping of historical considerations for purely racial reasons that is criticized in *Miller I*.

As to the DOJ's "Illustrative Plan," it splits both Muscogee and Bibb Counties and does so on the basis of race. The DOJ has the temerity to tell this Court that its

plan comports with "the State's traditional districting practices," and that it is not "predominantly" based on race. (DOJ Brief, pp. 15-25) This contention is extraordinary given that the DOJ submitted its plan out-of-time in order to shield the plan and its purposes from cross-examination by the parties and scrutiny by the court. Why, for example, were certain counties included in particular districts? Was it for racial reasons entirely or substantially? Were the county splits based predominantly – or entirely – on race? Given the DOJ's unabashed philosophy here – that the maximum number of black districts should be imposed by any means possible – the certain outcome of such an inquiry, had cross-examination been allowed, is apparent. That the Solicitor General would now describe in his brief the supposed purposes of this plan – and to act as if race was not a very real, driving purpose – is remarkable given the tactical ploy the DOJ used to get this plan in the record without disclosing its true purposes.

D. The Court Afforded All Parties Adequate Opportunities To Introduce Section 2 Evidence.

The *Abrams* appellants incorrectly argue that they were not allowed a hearing on their dilution claim. (*Abrams* Brief, p. 44) In fact, the court allowed all parties – including the intervenor-appellants – a full hearing on the issue of remedy. That hearing took place October 30-31, 1995. There were no restrictions placed on the

evidence or arguments one could offer at that time.[7] If intervenors claimed that Section 2 vote dilution principles demanded that a certain kind of reapportionment plan be adopted, their opportunity to present evidence to that effect was at that time (as well as at the merits trial itself). Their failure to present such evidence is their failure, not the court's "refusal" to hear them. As the court's order expressly notes, appellants advanced Section 2 claims at the remedy hearing. They were simply rejected, based on the evidence.

> During the remedy phase of the hearing, a significant portion of the argument centered on whether the Court's remedy would be required by Section 2 to contain two majority-minority districts. We have considered Section 2 and the case law construing it, and we conclude that two majority-minority districts are not required by Section 2 because including two such districts would violate *Johnson II*'s principles. (U.S. J.S. 19a)

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[7] The only exception is that one witness was excluded when offered on behalf of certain amici who had been invited to participate because that witness had not been identified previously. In fact, he was substituted at the last minute for another witness who had been impeached during his pre-hearing deposition.

III. THE COURT'S PLAN MADE THE REQUIRED GOOD FAITH EFFORT TO ATTAIN POPULATION EQUALITY AMONG THE DISTRICTS, AND THE SLIGHT DEVIATION THAT RESULTED IS WITHIN CONSTITUTIONAL LIMITS.

A. The Population Deviations In The District Court's Plan Are Nearly Zero, And They Are Much Less Than The Present Day Difference That Result From The Population Changes That Have Occurred Around The State Since The 1990 Census.

The population deviation among the districts is *de minimis*. The plan "has an overall population deviation of .35%, and an average deviation of .11%." (U.S. J.S. 6a) Appellants assert that another plan with a lower overall deviation (0.19%) was offered by the Department of Justice, and the *Abrams* appellants contend that "given modern computer technology, there is no reason why there should be any deviation in a court ordered congressional redistricting plan." (*Abrams* Brief, p. 49) Appellants' assertions ignore the facts of the case, the law, and common sense.

The district court explicitly found that no other plan presented to it – *that was constitutional* – had a lower deviation. That finding included, of course, the "Illustrative Plan" offered by the Department of Justice, which sought to perpetuate the existing unconstitutional districts. (U.S. J.S. 7a-8a)

Indeed, common sense should preclude the appellants' argument on this point. We are now closer to the census for the year 2000 than we are to the 1990 census.

Without doubt, there have been substantial population changes over the past six years throughout Georgia, which is one of the fastest growing states in the country. Even exact mathematical precision in a reapportionment plan based on the 1990 census necessarily must have significant current deviations *today*, in some cases surely surpassing ten or twenty percent. Under these circumstances, in between censuses as we are, it would be absurd to criticize a district court's plan that had a total population deviation of .35% because "modern computer technology" could reduce the number further. Modern computer technology cannot, in fact, make the number any lower because it cannot account for the tremendous population changes that have occurred since 1990.

B. The District Court Here Made A Good Faith Effort To Attain Population Equality, And That Is All That Is Required By This Court's Precedents In Light Of The Minuscule Deviation That Exists.

Appellants contend that absolute population equality among the districts is an impenetrable barrier, a barrier run afoul of by the .35% population deviation in this case. In so arguing, however, appellants ignore what this Court has actually said on this issue. Appellants also ignore, once again, the actual findings of the district court upon these issues, and the court's extensive efforts to attain population equality.

Karcher v. Daggett, 462 U.S. 725 (1983), struck down a contorted New Jersey congressional redistricting plan that had a population deviation *double* the court's plan

here. Nevertheless, the fact that New Jersey's plan had a total deviation of .70% was not, by itself, a sufficient basis for a judgment of unconstitutionality. Rather, this Court held that even that deviation would be permissible if it was the result of (1) a good faith effort to attain population equality and (2) a good faith effort to make some accommodation to other legitimate interests of the State.

> Precise mathematical equality . . . may be impossible to achieve in an imperfect world; therefore the "equal representation" standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality "as nearly as is practicable." *Karcher*, 462 U.S. at 730, quoting from *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

Rather than a rigorous straightjacket, this constitutional requirement imposes a good faith standard on a redistricting plan:

> [T]he "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

Karcher went on to discuss explicitly what this "good faith effort" meant and what kinds of considerations might warrant some population variance:

> *White v. Weiser* [412 U.S. 783 (1973)] demonstrates that we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts. *Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact,*

> *respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent representatives. Id.* at 740 (emphasis added).

None of these legitimate, neutral redistricting considerations had played a role in New Jersey's reapportionment. Its reapportionment plan was horrifically contorted, giving little or no weight to considerations such as regularity, compactness, or maintaining political subdivisions. It was because of that – together with the population deviation of .70% – that the district court's judgment striking the plans as unconstitutional was affirmed.

The facts here are completely different. Not only is the total deviation in the present case *one-half* of what it was in *Karcher*, the deviation is the product of the district court's effort to adhere to legitimate, neutral, and non-racial redistricting principles such as compactness, preservation of prior district cores, respect for county boundaries, and the like. The district court went on at great length to describe how it took these factors into consideration, and how doing so produced the small deviation that exists. (U.S. J.S. 7a-11a) That is precisely the kind of good faith effort to attain population equality that this Court approved in *Karcher*.

That the appellees are correct in their reading of *Karcher* is underscored by the case of *Preisler v. Missouri*, 341 F.Supp. 1158 (W.D. Mo.), summarily aff'd sub nom, *Danforth v. Preisler*, 407 U.S. 901 (1972). The district court there approved a redistricting plan with a deviation of .63% where the reasons for those deviations were more rational than in the New Jersey case. This Court affirmed

in the Missouri case, even though the deviation was approximately double that here.

Finally, appellants should be estopped from even raising this argument because it is contrary to the position they advanced in the district court. There, the *Abrams* intervenors advocated a plan with a deviation of .93%, nearly three times as great as the court's remedy. And the *Abrams* intervenors justified that deviation under the same kind of reasoning that the district court followed here. As the intervenors' lawyer, Laughlin McDonald, stated in describing their plan:

> Now, in our plan our deviation is .93. So I did want to alert the Court that in our view that is something that the Court needs to be concerned about, but it may be removed by *Karcher* as long as you have an articulable basis for it. (Tr. 284)

Mr. McDonald went on to say, "it may well be that [the] principle of maintaining the integrity of those counties articulated, expressed and justified in the record would excuse the deviations of that .9 percent." (Tr. 284) The attorney representing the Department of Justice promptly endorsed Mr. McDonald's one-person/one-vote comments: "I agree, generally, with Mr. McDonald's assessment of one person one vote." (Tr. 396)[8] The intervenors' demographer, Selwyn Carter, went even further, testifying on direct that maintaining political subdivisions was

[8] The DOJ attorney also went on and stated – directly contrary to their argument here (that the unconstitutional 1992 plan should be the template for a remedy plan under *Upham*) – that "several courts during the 1990 redistricting process have required that you start from scratch and adopt redistricting plans based on a clean slate." (Tr. 396)

even more important in his drafting of plans than population equality:

> Q: Did you construct the counties in the Eleventh to comply with one person one vote?
>
> A: Yes, but a more overriding reason was to keep the political subdivisions intact. I say that because sometimes when you tend to focus on keeping whole counties intact that has the effect of increasing the overall deviations of the plan. So I would say that respect for political subdivisions was the higher criteria. (Tr. 301-02)

Having taken positions below diametrically opposite their present ones, both the *Abrams* intervenors and the DOJ should be deemed to have waived this issue.

C. Even If The Appellants Were Correct, The Remedy Would Not Be To Impose One Of Their Preferred Plans, But Rather To Make Minor Adjustments In The Court's Plan.

Even if there were any merit to the appellants' one-person/one-vote argument, the remedy they hope for would not be forthcoming. It is their tactic, in complaining about a supposed population inequality, to try and force the district court to adopt one of their two black district plans. Their remedial contention is misplaced. If it were true that the district court's plan should have an even smaller population deviation, the appropriate remedy would be to remand to that court to make minor adjustments to that plan. There would be no reason to throw the entire plan out because of any issue of population equality.

IV. THE DISTRICT COURT'S REMEDY WAS NEITHER "RETROGRESSIVE" NOR VIOLATIVE OF SECTION 5 OF THE VOTING RIGHTS ACT.

The *Abrams* appellants contend that the district court's remedial plan is "retrogressive" and that it violates Section 5. While the Department of Justice did not deem this issue worthy of note in its jurisdictional statement, it now also advances such a claim in its principal brief. The argument is without merit.

A. By Its Very Terms, Section 5 Does Not Apply To The District Court's Remedy In This Case.

The express language of Section 5 would appear devoid of any ambiguity. It provides that, whenever a *"State or political subdivision"* seeks to change its voting "practice or procedures" to something different from what they were on November 1, 1964, it cannot do so without first obtaining a favorable declaratory judgment in the United States District Court for the District of Columbia or obtaining administrative "preclearance" from the Attorney General. When such judicial or administrative "preclearance" is sought, a State or local jurisdiction is generally entitled to a favorable ruling when the practice at issue is not "retrogressive." *City of Lockhart v. United States*, 460 U.S. 125 (1983); *Beer v. United States*, 425 U.S. 130 (1976).

Appellants admit that the district court's injunctive remedy here is not covered by the statute. No one suggests that the court's remedy should either be "precleared" by the Attorney General or submitted to the District Court for the District of Columbia. That is true

because the remedy is a "court ordered plan." *See, e.g., Connor v. Johnson*, 402 U.S. 690, 691 (1971).

Notwithstanding the fact that the statute does not apply here by its very terms, appellants contend that the substance of the statute should be imposed upon the district court regardless. As the DOJ puts it, this Court should force Section 5 on the district courts by making them "ascertain that the resulting plan satisfies the legal standards applicable to redistricting plans, and Section 5 provides one source of such standards." (DOJ Brief, p. 37) Appellants' argument is not one grounded in law or logic. Having had its Section 5 "black-max" strategy rejected by this Court in *Miller I*, the DOJ is simply trying now to cling to what it lost. The DOJ's newest contortion of Section 5 is nothing more than an effort to hold onto as much as possible of the gerrymanders forced on the States in 1992. Appellants' argument is lawless.

B. The Various Standards That Appellants Suggest As A "Benchmark" For Measuring Retrogression Are Arbitrary And Unjustifiable.

Appellants make all kinds of different arguments concerning what should be the "benchmark" by which retrogression should be measured in this case. The variety of suggested standards and the indefiniteness of the appellants' positions underscore how tenuous their argument is.

First, the *Abrams* appellants claim that, since the reapportionment plan for Georgia under the 1980 census contained one black majority district out of ten, a new plan could never have less than ten percent majority

black districts. Since the court's plan has one majority-minority district out of eleven, that being nine percent, appellants contend that the plan is fatally retrogressive. (*Abrams* Brief, p. 47) But to argue that the ten percent 1982 plan created a benchmark that was violated here, puts form far above substance and trivializes the great original purpose of the Voting Rights Act. While it is true that Georgia's population did increase sufficiently to allow for the addition of a new congressional representative, it was hardly "retrogressive" to devise a new plan that continued to have one majority-minority congressional district in the delegation.

Alternatively, the *Abrams* appellants argue that the "benchmark" for Section 5 should be the initial plan passed in 1991 that contained two majority black districts. This plan, of course, never went into effect because of DOJ Section 5 objections. Yet another "benchmark" that the *Abrams* appellants suggest is the supposed "state policy and goal of creating two majority black districts." (*Abrams* Brief, p. 48).

The *Abrams* appellants at least concede that the 1992 plan that has been held unconstitutional – and which contained three majority black districts – is not an appropriate Section 5 benchmark. Since that plan is illegal, and since the number of black districts was a direct product of the unconstitutional conduct of the DOJ, this should be obvious. As the *Abrams* appellants acknowledge, "[t]here is no state or federal policy that is advanced by using an admittedly unconstitutional plan as a benchmark." *Id.* at 47. But for the same reason, any use of the 1991 plan must fail. The majority black eleventh congressional district in

that plan suffered the same kind of DOJ-originated infirmity as the final 1992 plan. Moreover, since the plan never went into effect because of the DOJ's Section 5 objection, it was never "legally enforceable" and could not, by law, constitute a benchmark under the DOJ's Section 5 regulations. (*See* 28 C.F.R. § 51.54(b)(1) and Order at U.S. J.S. 27a & note 20.) *See also Perkins v. Matthews*, 400 U.S. 379, 394-95 (1971).

Moreover, appellants' assumption that the Section 5 benchmark standard imposes an iron-clad, impenetrable barrier is misplaced. Because the district court found that no additional majority-minority congressional districts could be drawn that were reasonably compact, and none could thus be drawn without unconstitutional gerrymandering, Section 5 could not possibly mandate the drawing of such a district. *See, e.g., City of Richmond v. United States*, 422 U.S. 358 (1975) (holding that even a retrogressive change is permissible under Section 5 if there are good governmental reasons warranting the change). To suggest that Section 5's retrogression standard demands that a State engage in unconstitutional redistricting is insupportable. To so construe Section 5 would render it unconstitutional.

The "benchmark" the DOJ contends should be imposed on the district court is telling. While the *Abrams* appellants are not so bold as to suggest that the final 1992 plan should be a benchmark, and the DOJ does not say quite that, the DOJ advocates the next closest thing. According to the United States, the district courts should be required by Section 5 to come as close to the unconstitutional plan as possible. The DOJ would read the law to permit only that most minimal reduction in racial

gerrymandering that is absolutely mandated by the Constitution, and nothing more. As the Department would have it, the 1992 plan would be the benchmark, with one modification:

> [I]nsofar as a reduction in minority voting opportunities is necessary to satisfy the Constitution, that reduction does not violate the principles of Section 5. . . . For that reason, legally significant retrogression would occur only insofar as a new plan reduces minority voting opportunity more than necessary to correct the constitutional defects of the 1992 Plan. (DOJ Brief, p. 40)

The excesses of the DOJ under Section 5 have been laid bare in recent years by decision after decision, both in this Court and in the district courts. The present argument makes clear that the DOJ remains wholly unrepentant. Having flouted the clear meaning of Section 5 during the 1991-92 reapportionment in order to force contorted plans on Georgia and other states, the DOJ now suggests a new construction of Section 5 – one crafted out of whole cloth – in an effort to salvage as much of its unconstitutional gerrymanders as it possibly can. More should be expected of the Solicitor General of this Nation.

Were the inapplicability of Section 5 not apparent from the face of the statute itself – as well as this Court's prior decisions – the wholesale randomness of appellants' suggested benchmarks would be reason enough to reject transplanting the statute to this environment. *See Holder v. Hall*, 129 L.Ed.2d 687 (1994). Section 5 was designed to be a quick, expedient way of allowing review of changes in covered election laws. But imagine what would ensue

if the DOJ's suggested standard would apply, requiring the district court to impose that one redistricting plan that fell just one iota short of being an unconstitutional gerrymander. What would be, in the Department's view, "just under" unconstitutional? Two majority black districts, and two more with at least a thirty-five percent black population? Or one more with a thirty-five percent black population? Or one more with a forty percent black population? The answer would be left entirely to the whims of the Civil Rights Division staff attorneys, unguided by anything remotely akin to principle.

CONCLUSION

For the reasons stated herein and otherwise appearing on the record in this case, appellants respectfully request that the judgment of the district court be affirmed.

Respectfully submitted,

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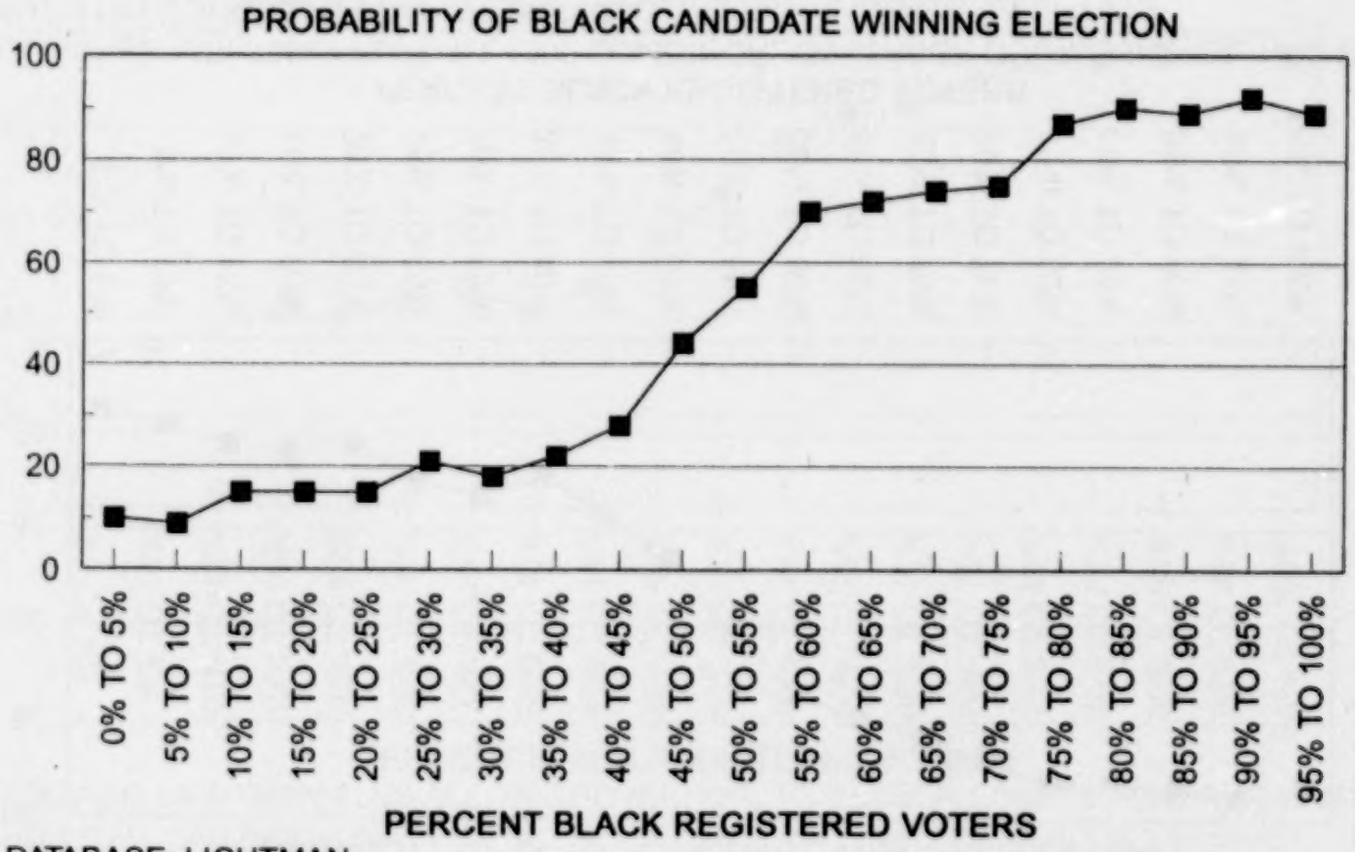

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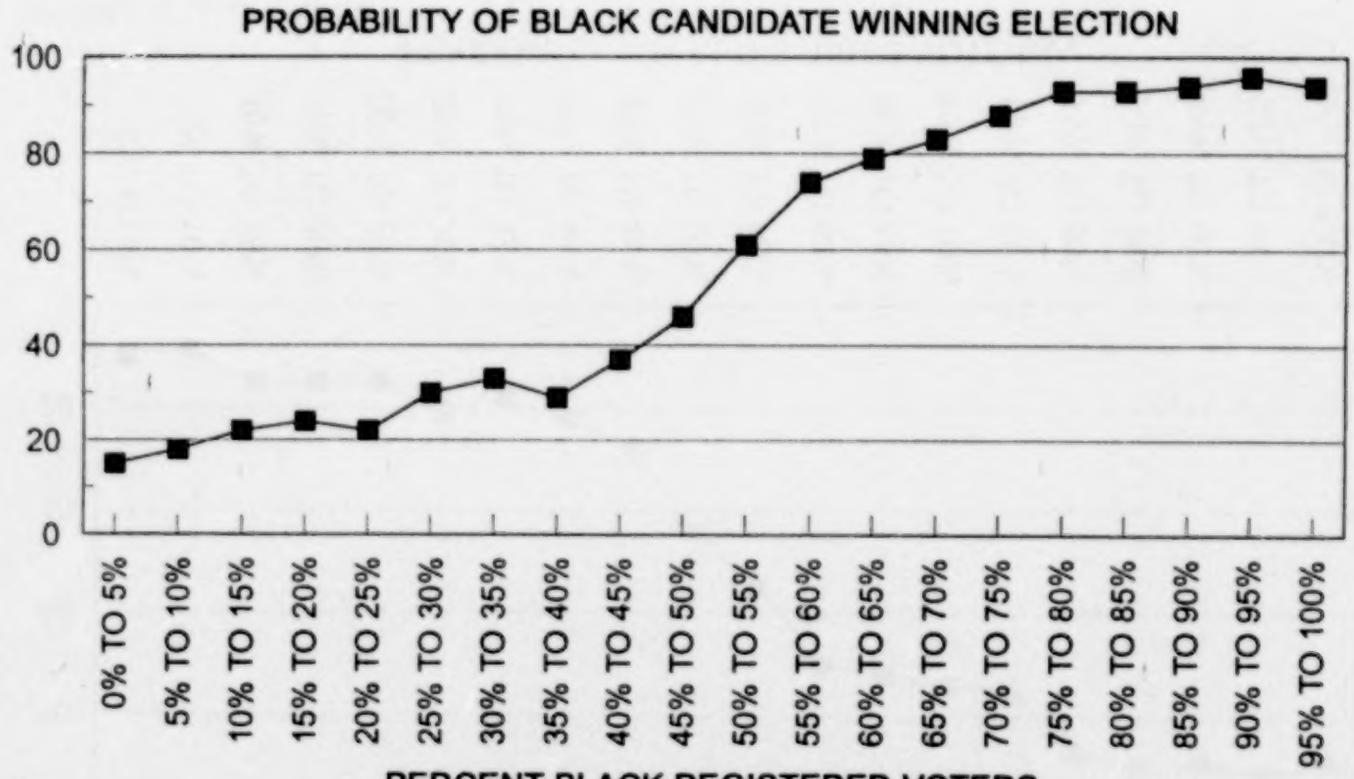

DATABASE: LICHTMAN PLUS ALL 1990 GOVERNOR, 1992 LABOR COMMISSIONER, 1992 2ND AND 11TH CONGRESSIONAL DISTRICTS.

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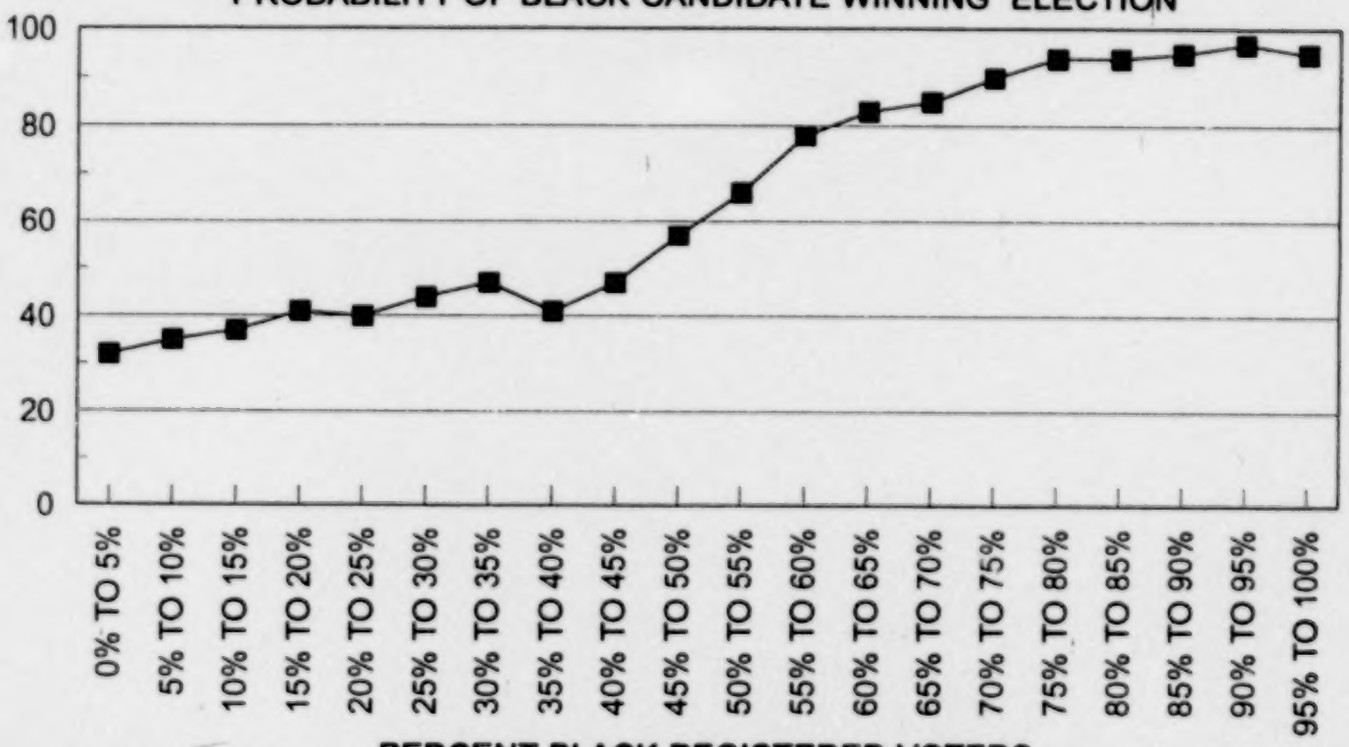

DATABASE: LICHTMAN PLUS ALL 1990 GOVERNOR, 1992 LABOR COMMISSIONER, 1992 2ND AND 11TH CONGRESSIONAL DISTRICTS, 1984 BENHAM, 1990 COOPER, 1990 BENHAM, 1992 SEARS-COLLINS.

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No. 95-1425

Supreme Court, U.S.
FILED
OCT 16 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

LUCIOUS ABRAMS, JR., REV. G. L. AVERY, WILLIAM GARY CHAMBERS, SR., and KAREN WATSON,

Appellants,

v.

DAVIDA JOHNSON, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia (Three Judge Court)

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I. State Policy Was to Create Two Majority Black Districts

Appellees claim that the state's decision to create two majority black congressional districts in 1991 was not an expression of state policy. Members of the reapportionment committee, according to appellees, felt "threatened" and intimidated by then Assistant Attorney General John Dunne who spoke at the Reapportionment Task Force of the National Conference of State Legislatures in Baltimore in June, 1990, and as a consequence "race was the predominant factor relied on by the State's demographer" in creating the state's initial plan. Brief of Appellees Johnson at 7-8; Brief of Appellees Miller at 10-1. The record does not support either contention.

A. *The State's Argument Is Contradictory.* As appellants have previously noted, *see* Brief of Appellants at 35, the state argued in its brief on the merits in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), that its initial plan was a reasonable expression of state policy and that race was not the predominant factor in the redistricting process. The state argued vigorously that:

> It is undisputed that the General Assembly as a whole found the initial [1991 congressional redistricting] plan enacted to be reasonable. It was not perceived as a 'racial gerrymander.' . . . *There is, in fact, no evidence that any legislator or reapportionment staffer ever believed the initial plan to be offensive as a racial gerrymander.*

Miller v. Johnson, No. 94-631, Brief of Appellants Miller at 49 (emphasis in original). The state repeatedly stressed "the undisputed consensus of all of the legislators involved – both white and black, Republican and Democrat – that the first plan was reasonable." *Id.* at 18.

The speaker of the house said that the Eleventh District as drawn in the first plan "suited me," was "obviously" acceptable, and denied that it was "a racial gerrymander." *Johnson v. Miller*, Civ. No. CV194-008

(S.D.Ga.) (*Johnson I*), T. Vol. II, 81. The chair of the house reapportionment committee similarly testified that in enacting the first congressional plan, "[we] thought we had done pretty well." *Johnson I*, T. Vol. III, 252 (Testimony of Bob Hanner). The state complied with the Voting Rights Act, as well as followed its traditional redistricting principles, *i.e.*, "we kept cities and counties intact." *Id.*[1] The appellees' present contention that the initial plan was not a reflection of state policy entitled to deference by the court is contradictory and disingenuous.

B. *Scape-Goating the Department of Justice and John Dunne.* As for coercion by Mr. Dunne, appellees are obviously trying to scape-goat the Department of Justice in general and Mr. Dunne in particular. In the printed version of his remarks at the Baltimore conference, which were given more than a year before the redistricting process began in Georgia, Mr. Dunne noted that following the 1980 census "we interposed Section 5 objections to 24 statewide redistricting plans . . . adopted by ten different states." Pl.Ex. 198, p. 5. While he gave two specific examples of non-compliance with Section 5, one from Georgia and one from California, no reasonable person could have felt "threatened" by Mr. Dunne's remarks.

> Referring to Georgia, Mr. Dunne said that:
>
> There, as many of you know, in a case known as *Busbee v. Smith*, we contended, and the court found, that preclearance could not be granted because the plan was produced, in part, by a desire to dilute black voting strength in the Atlanta area.

Id. at 6. In his concluding remarks, Mr. Dunne, a former state legislator, was both conciliatory and sympathetic to the redistricting task confronting state legislatures. He assured the various state delegations that:

---

[1] The private appellees, moreover, never contended in the district court that the initial plan was unconstitutional and introduced no evidence that it was. *Johnson I*, T. Vol. II, 23.

> we understand the problems that you face in attempting to devise and enact new districting plans . . . [b]ut I believe that together we can ensure that the coming round of redistricting efforts will produce plans that provide the full measure of fairness to racial and language minorities required by the Voting Rights Act and the Constitution.

Id. at 13. Mr. Dunne made no mention of whether Georgia was, in his view, obligated to create two majority black congressional districts.

C. *The State's Reasons for Drawing the Initial Plan.* The state made the decision to create two majority black districts for a number of reasons. One was the advocacy of the black members of the general assembly who argued for greater minority participation and racial fairness in congressional redistricting. *Johnson I*, T. Vol. II, 124; T. Vol. III, 234-35; T. Vol. IV, 101, 247-48. The Black Caucus reasoned that because of racial bloc voting and the history of past discrimination, additional majority-minority districts were needed to provide blacks with equal electoral opportunities. *Johnson I*, T. Vol. IV, 228.

The state also believed that it had a duty under the Voting Rights Act to avoid diluting minority voting strength. Both houses, for example, adopted redistricting guidelines in 1991 which included, *inter alia*, avoiding "diluting minority voting strength and . . . comply[ing] with Sections 2 and 5 of the Voting Rights Act." *Miller v. Johnson*, 115 S.Ct. at 2483; *Miller v. Johnson*, No. 94-797, J.App. 65-77. Bob Hanner, chair of the house reapportionment committee, said that adding an additional majority black congressional district was "the positive thing . . . to do." *Johnson I*, T. Vol. III, 252.

The state's concern over Section 2 was far from merely academic. Between 1974 and 1990, Section 2 vote dilution lawsuits were filed against 40 cities and 57 counties in Georgia challenging their at-large systems of elections. *See* L. McDonald, M. Binford & K. Johnson,

"Georgia," in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* 81 (Chandler Davidson & Bernard Grofman eds, 1994). As a result of the litigation, all but one of the cities, and 53 of the counties, changed to district systems containing majority black districts. *Id.* at 100.

As it began redistricting in 1991 the state was aware not simply of the requirements of Section 2 but also the fact that majority-minority districts were generally necessary to provide blacks a realistic opportunity to elect candidates of their choice.

In its brief to this Court, the state acknowledged that other than Andrew Young in 1972 *"[i]n the 500 or so other congressional elections held in Georgia over the past century, no black candidate has ever won in a majority white district."* *Miller v. Johnson*, No. 94-631, Brief of Appellants Miller at 19 (emphasis in original). "Surely," the state argued, "the General Assembly was entitled to assume, as a simple empirical matter, that this compelling historical pattern was likely to continue in the immediate future." *Id.* at 36. In enacting congressional redistricting, therefore, the state had an obvious incentive to adopt a non-dilutive plan and insulate itself from a possible Section 2 vote dilution challenge.

The state was also concerned with complying with Section 5, particularly because *all* of its prior congressional redistricting plans had run afoul of preclearance. The congressional plan initially passed by the state in 1971 discriminated against minorities in several ways and was rejected by the Attorney General under Section 5. The plan divided the concentration of black population in the metropolitan Atlanta area into the Fourth, Fifth, and Sixth Districts to insure that the Fifth would be majority white. *Johnson I*, Stipulations 170, 173, 180 [hereinafter Stip.]; *Busbee v. Smith*, 549 F.Supp. 494, 500 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983). The plan also moved the residences of blacks who were recognizable potential candidates from the Fifth to the Sixth District, *i.e.*, Atlanta

Vice-Mayor Maynard Jackson and Andrew Young, who had run for the Fifth District in 1970. Stips. 172, 180; *Busbee v. Smith*, 549 F.Supp. at 500.

The state's 1981 congressional plan was also rejected under Section 5 as being the product of intentional discrimination. It maintained white majorities in nine of the ten districts and increased the black population in the Fifth to 57.3%. Stip. 188. While blacks were a majority (52%) of the voting age population (VAP) in the Fifth District, they were a minority (46%) of registered voters. Stip. 189. The plan, as did the 1971 plan, split the concentrated black population in the metropolitan Atlanta area into three districts, the Fourth, Fifth, and Sixth, to minimize minority voting strength. Stips. 190-91, 195, 206, 234-35; *Busbee v. Smith*, 549 F.Supp. at 515.

The state submitted the plan for Section 5 preclearance and the Attorney General objected. Stip. 183. The state then filed a declaratory judgment action in the District Court for the District of Columbia, which also denied preclearance. Stip. 186. The senate had passed a congressional plan containing a 69% majority black Fifth District, stip. 215, but the house rejected it. Stips. 216-18. Joe Mack Wilson, chair of the house reapportionment committee and the person who played the instrumental role in congressional redistricting, frankly explained to his colleagues that "I don't want to draw nigger districts." *Busbee v. Smith*, 549 F.Supp. at 501; stip. 199. He generally opposed legislation of benefit to blacks, which he referred to contemptuously as "nigger legislation." *Busbee v. Smith*, 549 F.Supp. at 500; stip. 199.

The District of Columbia court concluded – on the basis of "overt racial statements, the conscious minimizing of black voting strength, historical discrimination and the absence of a legitimate non-racial reason for adoption of the plan" – that the state's submission had a discriminatory purpose in violation of Section 5. *Busbee v. Smith*, 549 F.Supp. at 517. As for Joe Mack Wilson, the court concluded that he "is a racist." *Id.* at 500.

The state submitted a remedial plan to the court which increased the black voting age population in the Fifth District to 60%, and the plan was precleared. Stip. 238; M. Barone & Ujifusa, *The Almanac of American Politics* 289 (1984). In deciding to add a second majority black congressional district in 1991, the state was determined to comply with Section 5, less because of the relatively benign comments of John Dunne than to avoid the acute, public embarrassment it had experienced in 1982 in federal district court.

The general assembly's decision to create two majority black congressional districts after the 1990 census was based upon a myriad of contemporary and historical facts and influences. It is a gross oversimplification – and innacuracy – to say that the decision was entirely in response to a speech by John Dunne.

II. The District Court Found Vote Dilution

While the district court refused to draw a second majority black district, it did find that it was necessary to draw a majority black district in the metropolitan Atlanta area in order to comply with Section 2 and avoid the dilution of minority voting strength. The court found that "Section 2 of the VRA required the Court to maintain the Fifth District as a majority-minority district." J.S.App. 18. Appellees, therefore, are plainly wrong in arguing that the record is "devoid" of Section 2 evidence. Brief of Appellees Miller at 29.[2]

Appellees are also wrong in saying that this Court has never addressed the standards applicable to Section 2 challenges to single member districting plans. Brief of

[2] Appellees did not cross-appeal on the issue of the creation of a majority black Fifth Congressional District and may not now argue that the district court erred in doing so. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976) (cross-appeal necessary to present an argument which would afford greater relief than was awarded by the lower court).

Appellees Miller at 30. In both *Growe v. Emison*, 113 S.Ct. 1075, 1084-85 (1993), and *Voinovich v. Quilter*, 113 S.Ct. 1149, 1157 (1993), the Court held that "the *Gingles* preconditions apply in challenges to single-member as well as multimember districts." *See also, Johnson v. De Grandy*, 114 S.Ct. 2647, 2654 (1994).

Appellees also say that appellants did not put up evidence "*concerning the probability of black-preferred candidates winning.*" Brief of Appellees Miller at 32 (emphasis in original). While appellants had no such burden,[3] the district court in fact found "a significant drop in the probability of a black candidate being elected as the black percentage of registered voters declines to fifty percent." J.S.App. 26. Appellees do not contend that this finding is clearly erroneous.

III. The Court's Plan Does Not Comply with One Person, One Vote

Appellees rely on *Preisler v. Missouri*, 341 F.Supp. 1158, 1162 (W.D.Mo. 1972), *aff'd sub nom., Danforth v. Preisler*, 407 U.S. 901 (1972), to justify the deviation in this case. *Preisler*, however, was decided prior to *Karcher v. Daggett*, 462 U.S. 725 (1983), and can hardly be authority for the application of the standards enunciated by this Court in its subsequent 1983 decision. Moreover, the holding in *Preisler* that the deviation in question was "minor" and therefore constitutionally permissible is contrary to the holding in *Karcher*, which rejected the argument that relatively small deviations were constitutionally *de minimis*. 462 U.S. at 733.

Finally, while *Preisler* was summarily affirmed, the one person, one vote issue was not directly presented to

[3] Under *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986), plaintiffs are required to show that minority favored candidates are "usually" defeated by majority bloc voting, not the "probability" of minority preferred candidates winning.

this Court. *See Danforth v. Preisler*, 40 U.S.L.W. 3561 (1972). Accordingly, the affirmance by the Court does not extend to an affirmance of the district court's ruling with respect to the one person, one vote issue. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (the precedential effect of summary affirmance extends no further than "the precise issues presented and necessarily decided by those [summary] actions"); *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979).

A. *The State's County Unit Policy Does Not Excuse Non-Compliance.* The state argues that Georgia has "a strong historical interest" in keeping counties intact in redistricting which justifies the deviations in the district court's remedial plan. Brief of Appellees Miller at 14. First, a state's policy of keeping counties intact cannot trump one person, one vote. *Kirkpatrick v. Preisler*, 394 U.S. 526, 533-34 (1969). Second, the state's policy of maintaining counties intact is rooted in the county unit system, whose purposes were to avoid apportionment based on population and to exclude blacks from effective participation in the political process.

The county unit system, which was invalidated in 1963 in *Gray v. Sanders*, 372 U.S. 368 (1963), was the scheme by which the rural, underpopulated counties maintained control of the state legislature,[4] and by which

[4] Under the Neil Primary Act of 1917, which codified the state's county unit system and provided the method for nominating candidates for statewide office in the primary elections, counties were assigned twice as many unit votes as they had representatives in the lower state house. The eight most populous counties each had three representatives and six unit votes apiece; the next 30 had two representatives each and four unit votes; and the remaining 121 had one representative each and two unit votes. *Gray v. Sanders*, 372 U.S. at 371 n.1. The smallest counties with one-third of the total population of the state controlled a majority of the county units. *Id.* at 373.

black political influence was minimized. According to the three judge court in *Johnson I*:

> Even after black citizens were provided access to voting, the state used various means to minimize their voting power. For example, until 1962 the county unit system was used to undermine the voting strength of counties with large black populations.

T. Vol. V, 142 (Statement of Judicial Notice). *See also Busbee v. Smith*, 549 F.Supp. at 499 (one of the purposes of the county unit system was "to destroy black voting strength"). The state's treatment of counties is not, therefore, the kind of "legitimate, consistently applied policy" that might excuse good faith compliance with one person, one vote. *Karcher v. Daggett*, 462 U.S. at 741.

B. *Appellants Did Not Waive Compliance with One Person, One Vote.* Appellees also wrongly contend that appellants have "waived" compliance with one person, one vote by presenting to the court a proposed plan that contained a deviation of .93%. Brief of Appellees Miller at 41. First, one of the plans advanced by appellants, Plan A, had a deviation of only .29%, which is lower than the deviation contained in the court ordered plan. J.App. 194-95.

Second, counsel for appellants stressed that the court "has really got to be concerned about deviations in any plan. . . . There is no *de minimis* deviation and a jurisdiction is obligated to make a good faith effort to comply with population equality concepts." T., Oct. 30, 1994, 281-82. Counsel repeated that "the Court ought not to fall into the trap of thinking that there are *de minimis* deviations." *Id.* at 283. Counsel specifically said that "if the Court is going to have a higher deviation . . . you must be careful to articulate the reason for doing so;" that the deviation in one of appellants' plans was .93%; "that you could split some counties . . . and cure those deviations;" and that appellants' plan preserving counties intact *and* creating two minority districts "may" be acceptable

under *Karcher v. Daggett*. *Id.* at 283-84. Counsel concluded that there would be "a serious legal issue if the Court were to draw a plan [with a high deviation] that contains less than two minority districts." *Id.* at 284. In light of the above colloquy, it is apparent that appellants did not waive any objections they might have to the court's failure to comply with one person, one vote.

IV. Section 5 Standards Apply to Court Ordered Plans

Appellees make the remarkable, and erroneous, claim that federal courts may implement remedial plans in total disregard of Section 5's retrogression standard. Brief of Appellees Miller at 43. While federal court ordered plans are not required to be submitted for preclearance,[5] the Court in *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981), quoted with approval the language of the legislative history of the act, S.Rep. No. 295, 94th Cong., 1st Sess. 18-19 (1975), that federal court ordered plans "should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases."

Federal court ordered plans are exempt from preclearance under Section 5 because there is a presumption that "the federal interest" will be adequately protected by the federal courts. *McDaniel v. Sanchez*, 452 U.S. at 150. But that is a far cry from saying, as do appellees, that federal courts can simply ignore the federal interest in Section 5. Indeed, a federal court has, if anything, a greater obligation than the states to apply and follow federal constitutional and statutory standards in implementing remedial plans.

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[5] State court orders implementing changes in voting are subject to Section 5 preclearance. *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16 (1982); *Gresham v. Harris*, 695 F.Supp. 1179, 1182 (N.D.Ga. 1988), *aff'd sub nom., Poole v. Gresham*, 495 U.S. 954 (1990).

Federal court ordered plans must comply more strictly with equal population standards than those enacted by a legislature, *Chapman v. Meier*, 420 U.S. 1, 27 (1975), they must be "free from any taint of arbitrariness or discrimination," *Roman v. Sincock*, 377 U.S. 695, 710 (1964), and they must meet "special standards . . . of racial fairness." *Upham v. Seamon*, 456 U.S. 37, 39 (1982). It would be strange indeed to hold a federal district court to lower standards of racial fairness and non-retrogression than state legislatures.[6]

Appellees' argument that a court could or should ignore Section 5 is further undercut by the body of law holding that federal courts apply Section 2 in shaping court ordered plans. *See Winter v. Brooks*, 461 U.S. 921 (1983) (*vacating and remanding Jordan v. Winter*, 541 F.Supp. 1135 (N.D.Miss. 1982) "for further consideration in light of Section 2 of the Voting Rights Act of 1965"); and *SRAC v. Theodore*, 113 S.Ct. 2954 (1993) (vacating and remanding "for further consideration in light of the position presented by the Solicitor General in his brief for the United States," which argued that the lower court "erred in failing to consider thoroughly whether its remedial

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[6] Lower federal courts have applied Section 5 standards as a matter of course. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1417-19 (7th Cir. 1984) (applying Section 5 "retrogression" analysis in determining liability and in establishing guidelines for a remedial plan); *Burton v. Sheheen*, 793 F.Supp. 1329, 1345 (D.S.C. 1992) (in fashioning a court ordered plan the court "must be cognizant of § 5 concerns that voting changes have neither the 'purpose . . . [nor] the effect of denying or abridging the right to vote' on the basis of race"), *vacated and remanded on other grounds sub nom., SRAC v. Theodore*, 113 S.Ct. 2954 (1993); *Seamon v. Upham*, 536 F.Supp. 931, 944 (E.D.Tex. 1982) (a court ordered plan must comply with Section 5 and have "neither a racially discriminatory purpose nor effect"), *vacated and remanded on other grounds sub nom., Upham v. Seamon*, 456 U.S. 37 (1982).

redistricting plans comply fully with Section 2," Brief for the United States as Amicus Curiae at 18).[7]

A. *The Court's Plan Is Retrogressive.* Given the state's demographics, a plan that contains only one majority black district is retrogressive within the meaning of Section 5, and that is true whether the benchmark is the 1982 plan, the 1991 plan, or some other plan embodying the state's redistricting goal of creating two majority black districts. If, however, the state's black population had declined, or disappeared altogether, appellants would not argue that the benchmark for retrogression would remain unchanged.

The black population in Georgia in fact increased from 1,464,435 in 1980 to 1,746,565 in 1990. *1980 U.S. Census of Population, General Social and Economic Characteristics, Georgia, PC80-1-C-12,* Tables 56 and 58; *1990 U.S. Census Population Figures, Georgia,* p. 1. The white population also increased, but the black overall percentage increased slightly from 26.8% in 1980 to 26.9% in 1990. *Id.* Again, in light of the state's demographics, the court ordered plan, which contained one of eleven majority black districts, was retrogressive compared to the 1980 plan, which contained one of ten majority black districts.[8]

The state appellees' argument that *City of Richmond v. United States,* 422 U.S. 358 (1975), contains a "good government" exception to Section 5 is misplaced. *City of Richmond* held that municipal annexations were not objectionable under Section 5 where the resulting districting "system fairly reflects the strength of the Negro community as it exists after the annexation." 422 U.S. at 371. The

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[7] The lower courts have similarly held that court ordered plans must conform to Section 2. *See, e.g., Dillard v. Crenshaw County,* 831 F.2d 246, 249 (11th Cir. 1987); *Hastert v. State Board of Elections,* 777 F.Supp. 634, 646 (N.D.Ill. 1987).

[8] This method of determining retrogression is virtually identical to the "straightforward" approach taken in *Beer v. United States,* 425 U.S. 130, 141 (1976).

court ordered plan in this case does *not* fairly reflect the strength of black voters as it currently exists. Under the rationale of *City of Richmond,* the court's plan is retrogressive.

V. There Was No Section 2 Hearing on the Court's Plan

Appellees mistakenly claim that appellants were given a hearing on their Section 2 "dilution claim." Brief of Appellees Miller at 34. The district court did conduct a hearing at which it allowed the parties an opportunity to present proposed remedial plans and to present evidence that their plans complied with Section 2, but it did not hold a hearing to allow the parties an opportunity to comment and present evidence concerning the plan the *court actually adopted.* Appellants believe the court erred in light of *SRAC v. Theodore,* 113 S.Ct. at 2954.

The Johnson appellees argue that allowing a Section 2 hearing after a court ordered plan was adopted would be "problematic." Brief of Appellees Johnson at 21. But such a procedure was precisely the one contemplated by the dissenting member of the three-judge court. Judge Edmondson expressed the view that:

> the Court would present a Court designated plan, but not order its implementation. Rather we would put it on the table for comment from counsel and so forth which, and again just speaking for myself, I think is a good idea. The idea of putting it on the table and letting everybody have a chance to say bad things about it before we signed on it as being our order.

T., Aug. 22, 1995, 46.

Allowing the parties to comment on a court ordered plan would also promote judicial economy by providing an opportunity for bringing any defects in the plan to the attention of the court for correction and perhaps obviating the need for appeal. *See, e.g., In re Perez,* 30 F.3d 1209, 1213 (9th Cir. 1994) ("[t]he principal reason we require

parties to raise an issue in the trial court is to give that court an opportunity to resolve the matter and, hopefully, avoid error"); *First National Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1339 (6th Cir. 1987) (the requirement that issues be presented and resolved in the trial court promotes "judicial economy"). Under the procedure adopted by the district court here, there is no opportunity to correct defects in the court ordered plan except by direct appeal to this Court.

VI. Appellants' Proposed Plans Follow Traditional Districting Principles

While appellees concede that the creation of a second majority black district is "technically feasible," Brief of Appellees Miller at 33, they claim that appellants' proposed plans were "predicated largely on the basis of race" and "intentionally cracked counties." *Id.* To the contrary, appellants submitted several plans, all of which were designed to correct the constitutional defects in the existing plan and none of which subordinated traditional redistricting principles to race.

Given the conflicting goals of keeping counties intact and maintaining a low deviation, appellants' plan with the lowest deviation, Plan A, split the greatest number of counties.[9] By contrast, the plan which split the fewest number of counties, ACLU1A (the least-change plan), had a deviation of .93%. Under the least-change plan the Eleventh District is composed of 14 whole counties; only two counties (both urban) are split, Richmond and

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[9] The Johnson appellees are wrong in claiming that the district court "specifically found" Plan A to be unconstitutional. Brief of Appellees Johnson at 11. The district court made no specific mention of Plan A – or any other plan proposed by the Abrams appellants. Nor is the deviation in Plan A "unknown." *Id.* The computer error is minor, and when corrected the total deviation remains .29%.

DeKalb. The court's plan, of course, also split urban counties.[10]

Appellees are incorrect in arguing that appellants have tried "to cover up the fact" that the Second District in their proposed plans contains some members of the military. Brief of Appellees Johnson at 13.[11] Members of the military are counted in the census and have to be allocated in any redistricting plan. Moreover, there are military installations in numerous counties throughout the state, *e.g.*, in Bibb (Warner Robins Air Force Base), in Camden (Kings Bay Submarine Base), in Chatham (Hunter Army Airfield), in Chattahoochee (Fort Benning), in Clayton (Fort Gillem), in Cobb (Dobbins Air Force Base), in Lowndes (Moody Air Force Base), in Richmond (Fort Gordon), in Fulton (Fort McPherson), and in Liberty (Fort Stewart). Under the court's plan there are substantial military populations in Districts One, Two, Five, Six, Eight, and Ten. J.S.App. In any case, the black voting age population (VAP) in the Second District in the Abrams appellants' least-change plan is 45.5%. Even if adjusted for the military, it is not majority-minority.

Reduced to its essentials, appellees' argument is that it is unconstitutional to create a district that has even a

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[10] Although it is irrelevant to any issue in this case, Donald Hill, a demographer employed by the Georgia Republican Party, did not, as appellees claim, Brief of Appellees Johnson at 12, "work for" the ACLU, nor did he "draw" any of the plans advocated by the Abrams appellants. All of the Abrams plans were drawn by Selwyn Carter, J.App. 141, who expressly denied Mr. Hill's involvement in their construction. T., Oct. 30, 1995, 327-28.

[11] Appellees claim that the military population is "non-voting," but they introduced no evidence of military voting patterns, nor did the district court make any findings about such patterns. On the record in this case, the extent to which members of the military vote is a matter of speculation.

substantial minority population, and that to survive challenge a redistricting plan must be gerrymandered for white voters by fragmenting the minority population to the greatest extent possible. Nothing in the decisions of this Court countenances such a radical result.

VII. The Decision Below Is Not Shielded by the Clearly Erroneous Rule

Rule 52(a), Fed.R.Civ.P., does not restrict the power of an appellate court to correct errors of law, "including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986), *quoting Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). The district court in this case made numerous errors of law which infected the fact finding process, *e.g.*, that it was "not bound by *Upham*," J.S.App. 5, that it had to proceed as if the state had adopted "no plans," J.S.App. 7, and that adopting a remedy that would be "minimally disruptive . . . was not an option." J.S.App. 29.

The district court's refusal to accord appropriate deference to the existing plan is both a mixed finding of law and fact as well as a finding that is predicated on a misunderstanding of the law. In either case, the court's subsidiary and ultimate findings are not, as appellees contend, shielded by the clearly erroneous rule. Brief of Appellees Miller at 23.[12]

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[12] For example, the court's finding that "future growth" in population justified the relocation of the Eleventh District in the northeast Atlanta corridor, J.S.App. 13, isn't entitled to deference under Rule 52(a) as appellees suggest, Brief of Appellees Miller at 24, because the court erred as a matter of law in totally disregarding the state's decision to locate the Eleventh District southeast from south DeKalb County.

A. *The Section 2 Record Involving the Second Congressional District Was Not Fully Developed.* Appellants reiterate that the Section 2 record concerning the unconstitutionality of the Second District was not fully developed. None of the parties vigorously defended the district. The state stipulated that race was the predominant factor in drawing some of the district lines, but it failed to put up evidence that other lines were drawn for non-racial reasons or that they were based on the state's traditional districting principles. Because of the absence of such evidence, the district court concluded that no part of the Second District could serve as a guide for a remedial plan. Whether or not appellants could have convinced the court to find the Second District constitutional, they could have established that some portions of the district were unobjectionable and thus that there was no basis for the court to proceed as if the state had drawn "no plans." J.S.App. 7.[13]

Appellants were able to argue at the remedy phase that their proposed plans complied with Section 2, but they were not allowed to put up evidence about the non-racial factors that went into the construction of the Second District, nor the extent to which the state relied upon traditional districting factors. Accordingly, no deference is due the district court's finding under Rule 52(a) that it was unable to use the existing plan "as the basis for a remedy." J.S.App. 6.

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[13] In an effort to shore up the district court's start-from-scratch approach, appellees claim that the "economic communities of interest" identified by the court provide "much of the rationale" for the location of the districts. Brief of Appellees Johnson at 25 (*citing* 922 F.Supp. at 1565, J.S.App. 17). The economic interest identified in District Two was "peanut production," in District Nine it was "carpet production," and in District Eleven it was "poultry production." J.S.App. 17. That peanuts, carpets, and chickens should provide the "rationale" for the existing districts underscores how arbitrary the plan is.

VIII. The Court's Plan Has Not Been Vindicated

Appellees claim that the court ordered plan is "vindicated" because the two black incumbents (Cynthia McKinney and Sanford Bishop) who were drawn into majority white districts were nominated in the Democratic primary. Brief of Appellees Johnson at 31.[14] McKinney and Bishop undoubtedly won nomination because they ran with the benefits of incumbency.[15] Their nomination does not mean that non-incumbent minority candidates will do as well.

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[14] While appellants acknowledge that both McKinney and Bishop were nominated, no formal request for notice was made nor have the election returns been provided as contemplated by Rule 201(d), Fed.R.Evid. ("[a] court shall take judicial notice if requested by a party and supplied with the necessary information"); *See Ass'n Against Discrimination v. City of Bridgeport*, 647 F.2d 256, 277 (2d Cir. 1981) (refusing to take judicial notice where insufficient information was supplied). In the absence of precinct returns, there is no way of knowing the black-white turnout in the primary, how many whites voted in the Democratic primary, or the extent of racial bloc voting. More important, this Court has consistently held that it "must affirm or reverse upon the case as it appears in the record." *Russell v. Southard*, 12 How. 139, 158-59 (1851); *accord, Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970). In addition, the district court's failure to accord any deference to the state's plans or to comply with one person one vote could not be cured by the nomination of McKinney and Bishop.

[15] *See, e.g.*, G. King & A. Gelman, "Systemic Consequences of Incumbency Advantage in U.S. House Elections," 35 *Am.J.Pol.Sci.* 110, 112-16 (1991) (estimating the incumbency advantage over the last decade to be between 6 and 12 percentage points); *see also*, Daniel Hayes Lowenstein, *Election Law* 656, Table 15.1 (1995) (noting that from 1946 to 1994, incumbent Representatives built a record on which they could seek re-election and with the strong benefit of incumbency were three and one-half times as likely to lose in a general election as a primary).

If anything, the nomination of McKinney and Bishop vindicates the legislature's creation of majority black congressional districts in 1992. The creation of such districts has not had the polarizing effect appellees claim; it has apparently had the opposite effect. It has allowed qualified minorities to run in highly integrated majority-minority districts and thus secure an entree into the political process which they would otherwise likely be denied.

According to one veteran observer of the voting rights scene,

> the creation of majority-minority districts and the subsequent election of minority candidates reduces white fear and harmful stereotyping of minority candidates, ameliorates the racial balkanization of American society, and promotes a political system in which race does not matter as much as it did before.

F. Parker, "The Constitutionality of Racial Redistricting: A Critique of *Shaw v. Reno*," 3 *D.C.L.Rev.* 1, 19-20 (1995); Brief Amicus Curiae of the Georgia Association of Black Elected Officials at 18-19. The record in this case supports this positive assessment.

In Georgia, the Second and Eleventh Districts became majority black for the first time in 1992. *Miller v. Johnson*, 115 S.Ct. at 2483-84. From 1984 to 1990, only 1% of white voters in the precincts within the Second, and only 4% of white voters in the precincts within the Eleventh, voted for minority candidates in statewide elections. An encouraging increase in white crossover voting occurred in 1992. Twenty-nine percent of white voters in the Second and 37% percent of white voters in the Eleventh voted for minority candidates in statewide elections that year. *Johnson I*, DOJ Ex. 24, Tables I-III. The court's plan, with its destruction of integrated majority-minority districts, is a step backwards from the goal of equal political participation.

CONCLUSION

For the above reasons, this Court should reverse the decision below.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 16 1996

Nos. 95-1460 and 95-1425

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

LUCIOUS ABRAMS, ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

REPLY BRIEF FOR THE UNITED STATES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

REPLY BRIEF FOR THE UNITED STATES

In our opening brief, we argued that the court-ordered remedial plan in this case deviates unjustifiably from the one-person, one-vote requirement of Article I, Section 2 of the United States Constitution; fails to satisfy the mandate of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, of equal

opportunity for minority voters to participate in the political process and elect representatives of their choice; and violates the rule set forth in *Upham* v. *Seamon*, 456 U.S. 37 (1982), that a court that creates a redistricting plan must not transgress state redistricting policy beyond what is required to correct the constitutional defects it finds. In addition, we pointed out that, although the question need not be reached, the district court's plan also violates the substantive nonretrogression standard embodied in Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

Appellees choose simply not to confront several of the key premises of our argument. Rather than attempt to defend the district court's clearly erroneous finding that the Illustrative Plan "splits numerous counties," they disregard it. See pp. 3-4, *infra*. Rather than challenge the district court's correct finding that Georgia's redistricting policy favored creating two compact majority-minority districts if possible, appellees ignore it. See pp. 11-12, *infra*. And rather than acknowledge that the district court's own findings establish that legally significant racially polarized voting exists in east-central Georgia, appellees attack us for relying on the facts as found by the district court. See pp. 6-8, *infra*. Those points, along with others addressed below, establish that the judgment of the district court should be reversed.

1. *Section 2.*

a. *Compactness.* The Johnson appellees argue (Br. 16-19) that the clearly erroneous standard of review applies to the district court's finding that African-Americans in east-central Georgia are not sufficiently compact and numerous to form a majority in a congressional district in that area. We agree that

that is the proper standard of review. The district court's finding, however, was clearly erroneous.

As we explain in our opening brief, the Illustrative Plan demonstrates that African-Americans in the east-central part of the State would be a majority in a reasonably compact district. The district court gave only one reason for rejecting the Illustrative Plan: That it "split numerous counties outside of the metropolitan Atlanta area, apparently for racial reasons." J.S. App. 8a n.4. Because the Illustrative Plan in fact splits only two counties outside of the Atlanta area, and because both of those divisions are explicable on non-racial grounds, the district court's conclusion was clearly erroneous. See U.S. Br. 15-18.[1]

Although the state appellees quote (Br. 28-29) the district court's flawed finding regarding the Illustrative Plan, neither group of appellees discusses it or explains how it could be correct. They do not argue that the Illustrative Plan splits "numerous counties"

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[1] The Johnson Appellees assert (Br. 10) that the Illustrative Plan "intensifies the racial line drawing in DeKalb and Bibb Counties," and they cite in support the district court's finding that Bibb County was racially gerrymandered in the plan declared unconstitutional by this Court. See J.S. App. 35a n.4. With respect to the Atlanta-area DeKalb County, which was divided in virtually every plan before the court, the Illustrative Plan cleanly divides the County along a north-south line and connects the southern portion with the neighboring counties to the south and east. With respect to Bibb County, the division of the county in the Illustrative Plan bears no resemblance to the division of that county in the unconstitutional 1992 plan, which joined a virtually non-contiguous portion of Bibb County to the Second District. Instead, the Illustrative Plan divides Bibb County in three clean parts and does not use "land bridges" or other mechanisms to circumnavigate areas of white population.

outside the Atlanta area. Nor do they contest the fact that the Illustrative Plan's division of two counties outside the Atlanta area serves to lower the overall population deviation of the Illustrative Plan and leave all of Fort Benning in a single district.[2] Those facts are sufficient to establish that the district court clearly erred.

Both the Johnson appellees and the state appellees do advance other arguments—not relied on or even adverted to by the district court—as to why the Illustrative Plan should be rejected. They argue, for example, that the Illustrative Plan was submitted too late. See State Appellees' Br. 27-29; Johnson Appellees' Br. 45-46. We disagree with that contention. The Illustrative Plan was submitted in response to the district court's request for comments on the plan that became the basis for the court's remedy; its purpose was to demonstrate that the plan would violate

[2] The Johnson appellees argue (Br. 13) that the Illustrative Plan and other plans "maintain[] the Second District as a viable minority district based on total population adjusted by deletion of non-voting military population," because those plans "incorporate a large non-voting, predominantly white military population at Ft. Benning." It is true that the Second District in the Illustrative Plan includes Ft. Benning. Appellees' remaining contentions, however, are unsupported by any findings of the district court, and appellees do not cite any record evidence in support of their assertions regarding the racial breakdown of the Ft. Benning military population or the extent to which that population votes in local elections. In any event, if the import of appellees' remarks is that the Illustrative Plan is defective because African-Americans may have the opportunity to elect a candidate of their choice there, they misapprehend the law in this area; the fact that a district would offer such an opportunity surely does not prove or suggest that it is defective.

Section 2. In any event, although appellees objected in the district court to what they believed was the late submission of the Illustrative Plan, the district court did not expressly rule on their objections. Instead, the district court rejected the Illustrative Plan (mistakenly, we contend) entirely on its merits. See J.S. App. 8a n.4. This Court should decline appellees' invitation to adjudicate in the first instance an objection regarding the district court's procedures.

The Johnson appellees argue (Br. 10) that the Illustrative Plan is not compact because two of its districts include what they believe to be "misplaced cores" that properly should be located in other districts.[3] The district court never adopted appellees' unexplained concept of "district cores." The district court did state that Georgia "has historically pre-

[3] Appellees (but not the court) identify (Br. 10 n.17) the four district cores as South DeKalb County (Fourth District), Augusta/Richmond County (Tenth District), Macon/Bibb County (Eighth District), and Savannah (First District). Appellees' identification of "district cores" is very questionable. For example, they claim (Br. 10) that Macon has been "the commercial core of the Eighth District for decades." In fact, Macon was located at the northern edge of the Eighth District—whose center is far to the south—for 19 years (not "decades") prior to the recent redistricting. See 94-631 J.S. 79, 80 (maps). Prior to that time, from 1933 through 1971, it was located in the Sixth District in the central or west central portions of the State. See *id.* at 78, 81 (maps). In any event, of the four district "cores" identified by appellees, the Illustrative Plan retains all of two of them and part of two others in what appellees view as the "proper" district. The court's plan also places part of one of those "cores"—southern DeKalb County—into the "wrong" (*i.e.*, the Fifth) district. Moreover, unlike the Illustrative Plan, the court's plan moves Athens/Clark County—which has been part of the Tenth District since at least 1933, see *id.* at 81 (map)—into the Eleventh District.

ferred to maintain the core of each district during reapportionment." J.S. App. 10a. The district court viewed the State's interest in "maintaining district cores" as an interest in keeping as many counties as possible together when the State is redistricted. The district court stated that its plan "maintains ninety-five counties (totally or partially) in the same districts as they were located in the 1982 plan." J.S. App. 10a. See also *id.* at 17a-18a. As we explained in our opening brief, the Illustrative Plan is superior to the court's plan on that measure. See U.S. Br. 24 n.16 (Illustrative Plan keeps 101 counties totally or partially within the same district as the 1982 plan).

b. *Racially polarized voting.* The Johnson appellees argue (Br. 34-37) that the appellants offered no evidence during the remedy hearing below of racially polarized voting. As we explained in our opening brief (Br. 26-27), however, the district court's own findings regarding the degree of racially polarized voting—findings that in our view substantially understate its degree[4]—demonstrate that a majority-preferred can-

[4] Appellees attack (Johnson Appellees' Br. 36-37; State Appellees' Br. 31) the methodology used by Dr. Allan Lichtman, the expert who testified for the United States regarding racially polarized voting at the original trial in this case. We based our argument that there is legally significant racially polarized voting in the east-central portion of the State on the district court's own findings on that subject. We referred to Dr. Lichtman's testimony (U.S. Br. 28-29) to demonstrate that the district court underestimated the problem, but that point was not necessary to our argument. Nevertheless, we continue to believe that Dr. Lichtman's testimony was sound. Indeed, Dr. Lichtman's methodology, including his emphasis on elections in which minority candidates ran against white candidates, was the same methodology relied upon by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 52-53 (1986)

didate would usually be unable to win election in any of the districts in the east-central portion of Georgia under the court's plan.[5] That conclusion is buttressed by, *inter alia*, the fact that courts have found racially polarized voting in past cases in several counties in the east-central portion of the State, see *id.* at 28, and by the district court's conclusion—relying on a statewide study whose conclusions are equally applicable across the State—that racially polarized voting *is* present in sufficient degree to establish a violation of Section 2 that requires a

(relying on data from "53 General Assembly primary and general elections *involving black candidacies*") (emphasis added). See also *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244-1245 (5th Cir. 1988), cert. denied, 492 U.S. 905 (1989); *Smith* v. *Clinton*, 687 F. Supp. 1310, 1316-1317 (E.D. Ark.), aff'd, 488 U.S. 988 (1988); compare *Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 502-504 (5th Cir. 1987) ("[t]hat blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference"), cert. denied, 492 U.S. 905 (1989). The fact emphasized by appellees—that a different three-judge court in a different case reviewing different evidence rejected the analysis given in that case by Dr. Lichtman—has little bearing on the validity of his testimony here.

[5] The State appellees (Br. 32) attack our calculations as "assuming crossover voting percentages similar to what the [district] court found existed." In this regard appellees are correct. For purposes of our analysis before this Court, we assume that the district court's crossover findings were correct and then demonstrate that, even operating under those (in our view, overly optimistic) statistics, racial polarization would usually prevent African-American voters from electing candidates of their choice in the Eleventh District under the district court's plan.

majority-minority district be created in the Atlanta area, see U.S. Br. 29-30.[6]

The State appellees (Br. 31) and the Johnson appellees (Br. 35-36) both contend that the doctrine of res judicata—or, more precisely, the doctrine of law of the case—precludes us from disputing what appellees believe to have been a finding in the district court's first decision in this case of a lack of racially polarized voting. They argue that that finding is now binding on the parties because this Court ultimately affirmed the district court's decision in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995). The resolution of a legal issue by a lower court, however, is never binding in this Court unless this Court has necessarily relied on that ruling in a previous decision.[7] In its previous

[6] The Johnson appellees also allege (Br. 37) that racially polarized voting could not be found on the record in this case because the polarization evidence at trial concerned the Eleventh District in the State's (unconstitutional) 1992 plan, which contains some different counties from the Eleventh District in the Illustrative Plan. Although the configurations of the two versions of the Eleventh District are quite different, they nonetheless contain substantial overlap. Therefore, evidence regarding polarization in the area of the State in which they overlap is relevant in analyzing both districts. In addition, of the six counties that are included in the Eleventh District in the Illustrative Plan but not included in the 1992 Eleventh District, see Johnson Appellees' Br. 37 n.60, the record in fact contains racial bloc voting data for three of them. See J.A. 79 (Bibb and Baldwin Counties), J.A. 81 (Newton County). The other three counties—Jones, Morgan, and Rockdale—contain only 15% of the district's population, and there is no evidence that racial voting patterns in those counties differ from the neighboring counties in the district.

[7] See *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979) ("The doctrine of law of the case comes into play only with respect to issues previously determined."); Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 4478, at 789 ("[Q]uestions that have not been decided do not become law of the case merely because they could have been decided.").

decision in this case, this Court did not reach any question regarding the degree of racially polarized voting in Georgia, because it disposed of the case on the ground that the Eleventh District as then drawn did not represent a compact and contiguous concentration of African-American voters. Therefore, this Court's prior decision in this case has no preclusive effect with respect to any issue regarding racially polarized voting.

c. *Other arguments.* Appellees advance several other arguments why Section 2 can be disregarded in this case. All of them are mistaken.

For example, the Johnson appellees argue (Br. 32) that, because "Section 2(b) requires we rely on the actual 'results' of elections, rather than predictions," and because "[t]here is no past track record to judge the 'effects' of a preexisting district's lines," it cannot be concluded that there is a violation of Section 2. A violation of Section 2(b) is shown, however, if it can be demonstrated that members of a minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). Where it can be shown that such a lessening of the minority's "opportunity" would result from a newly-imposed plan, a violation of Section 2(b) is established. The fact that the plan is newly enacted or newly imposed has never been viewed as a defense,

and appellees cite no authority for granting such a sweeping immunity.[8]

The Johnson appellees also urge (Br. 31-33) that the results of the primary elections held a few months ago, *after* the court below rendered its decision, demonstrates that the court's plan satisfies Section 2. In the only one of those elections of possible relevance to this case, the African-American incumbent who had been elected under the prior plan—Congresswoman Cynthia McKinney—ran in the Fourth District under the court's plan and won the Democratic primary. But the bare fact that Congresswoman McKinney won a Democratic primary election is hardly probative. Appellees offer no explanation or analysis regarding the extent to which the Democratic primary vote was racially polarized. In this regard, just as a minority candidate's loss in one election does not establish legally significant racially polarized voting, a minority-preferred candidate's victory in a single election does not establish its absence. Moreover, this Court has explained that a single election's results may not be accorded overwhelming weight in the analysis of racially polarized voting, because "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." *Thornburg* v. *Gingles*, 478 U.S. 30, 57 (1986). And

[8] This Court and the lower courts have frequently adjudicated Section 2 challenges to newly-enacted or newly-imposed districting plans without intimating that such plans are immune from Section 2 liability. See, *e.g.*, *Growe* v. *Emison*, 507 U.S. 25 (1993); *Voinovich* v. *Quilter*, 507 U.S. 146 (1993); *Johnson* v. *DeGrandy*, 114 S. Ct. 2647 (1994).

there remains the possibility that "special circumstances" such as incumbency, see *id.* at 57, rendered a particular election atypical and therefore not reflective of the general extent of racially polarized voting in a jurisdiction.[9]

2. *Adherence to State Policy.* In our opening brief (Br. 33), we emphasized the district court's statement that "[i]f Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the [district court] would have included one since Georgia's legislature probably would have done so." J.S. App. 21a n.16. Yet, as we explained, the Illustrative Plan demonstrates that Georgia's legislative preference to create a second majority-minority district could have been satisfied "without subverting traditional districting principles." The district court's failure to respect the legislative preference was the result of its error in rejecting the Illustrative Plan. See p. 3, *supra*. Consistent with *Upham* v.

[9] We noted in our opening brief (Br. 21) that it is relevant to the totality of the circumstances in this case that African-Americans constitute 27% of the State's population but under the district court's plan will constitute a majority in only 9% (one out of eleven) of the congressional districts. The State appellees harshly criticize our discussion of that fact (Br. 30 n.4), stating that "it is difficult to imagine a more circular argument." This Court, however, has held that proportionality "is obviously an indication that minority voters have an equal opportunity" and it has held that disproportionality too has varying degrees of "probative value," depending on the other facts in the case. *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2661 & n.17 (1994); see also *id.* at 2664 (O'Connor, J., concurring) ("proportionality * * * is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive").

Seamon, 456 U.S. 37 (1982), that error should be corrected.[10]

Appellees simply disregard the district court's specific finding that Georgia's legislature would have drawn a second majority-minority district. That finding was supported by ample evidence. The first plan adopted by the State following the 1990 census—prior to any objection by the Department of Justice—included two majority African-American districts, one of which resembled the Eleventh District in the Illustrative Plan. Compare J.S. App. 46a (1991 Plan map) with *id.* at 44a (Illustrative Plan map). Accordingly, it provides strong support for the district court's finding that the State's districting policies included a desire to create two majority-minority districts, if that could be accomplished consistent with its other traditional districting policies.

Appellees argue (State Appellees' Br. 10-11; Johnson Appellees' Br. 6-8) that the State's 1991 plan was tainted by interference from the Department of Justice and therefore did not represent the State's genuine preferences regarding redistricting. Their claim

[10] The state appellees err in claiming (Br. 21) that our argument is based on "the assumption that any plan that contains significant changes from the old [*i.e.*, unconstitutional] plan * * * must automatically fail to be a 'minimum change' plan and must therefore violate the constraints of *Upham* v. *Seamon*." That is not the argument advanced in our opening brief (see U.S. Br. 32-35), and it is not an argument we support. As our brief made quite clear, our argument does not rest on the assumption that the district court's remedy had to resemble the plan declared unconstitutional to any specific degree. It does rest on the premises—found by the district court—that state policy favors the drawing of a second majority-minority district in the east-central portion of the State and that that policy should be respected.

that the taint arose from a speech by Assistant Attorney General John Dunne at a 1990 meeting is, however, belied by the printed version of Mr. Dunne's remarks. Those remarks, which are in the record in this case, simply recognize that objections had been interposed in Georgia and a number of other States after the 1980 redistricting, and that Georgia's effort to obtain judicial preclearance at that time had been unsuccessful. See Pl. Exh. 198, at 5, 6. In any event, the district court made no finding that the 1991 plan was tainted. Rather, the court stated that that plan (which the court mistakenly referred to as "the first plan enacted in 1992") "gave * * * a clearer understanding of legislative intent." J.S. App. 13a & n.9. The court's only reservation was that the 1991 plan was not "a perfect guide since it contained many of the same features in its Eleventh District that found their way into the unconstitutional Eleventh." J.S. App. 13a n.9. But absent a finding that the State included those features for reasons of race and in contravention of its traditional districting principles, the fact that the 1991 Eleventh District shared some geographical features with the plan ultimately declared unconstitutional is of no significance. See, *e.g.*, *Bush* v. *Vera*, 116 S. Ct. 1941, 1951 (1996) ("For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race."); *id.* at 1969 (O'Connor, J., concurring) ("Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply.").

Both sets of appellees (State Appellees' Br. 19-21; Johnson Appellees' Br. 21-24) argue that the district court was justified in departing from state policy in this case because of the vital need to remedy viola-

tions of the Equal Protection Clause and remove all vestiges of the underlying violation. We agree that district courts possess broad powers to do what is necessary to cure such violations. The district court had whatever authority it needed in this case to see to it that the racial gerrymandering in the unconstitutional plan was remedied. It does not follow, however, that the district court had the discretion not only to eliminate racial gerrymandering, but also gratuitously to ignore other, constitutional state policies. The essence of a violation of the principles of *Shaw* v. *Reno*, 509 U.S. 630 (1993), is that the State has departed substantially from its traditional districting principles and has done so on the basis of race. See *Bush* v. *Vera*, 116 S. Ct. at 1951; *id.* at 1969 (O'Connor, J., concurring). No opinion of this Court suggests that a district court faced with a *Shaw* violation must intentionally depart from valid and constitutional state policies—and disregard Section 2 of the Voting Rights Act—in order to avoid creating a majority-minority district. Any such principle would gratuitously disadvantage minority groups in the districting process and should be rejected.

3. *One-Person, One-Vote.* The Johnson appellees argue (Br. 46) that the divergence in the court's plan from the one-person/one-vote principle is acceptable. They rely on the average deviation in the two plans—the sum of the divergence in each district from absolute population equality divided by the number of districts. In our view, that measure tends to understate the difference between the two plans. This Court in *Karcher* v. *Daggett*, 462 U.S. 725, 732, 737 n.8, 739 & n.10, 741 (1983), accordingly relied instead on the measure of overall population deviation, see U.S. Br. 6 n.3, which the *Karcher* Court called "maximum

deviation." Nonetheless, the Johnson appellees concede (Br. 43) that even the average deviation in the court's plan is greater than the average deviation in the Illustrative Plan.[11] Their argument that it is not *much* greater is unavailing in light of what the district court itself conceded were the strict standards that apply to court-ordered redistricting. J.S. App. 7a.

Appellees both argue (Johnson Appellees' Br. 44-46; State Appellees' Br. 39) that the greater deviation in the court's plan is justified because the court's plan better adheres to Georgia's desire to maintain county lines intact. As we noted in our opening brief, this Court has rejected the proposition that county lines are sacrosanct in the congressional redistricting process. U.S. Br. 17 (citing *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 533-534 (1969); *Wells* v. *Rockefeller*, 394 U.S. 542, 546 (1969); *White* v. *Weiser*, 412 U.S. 783, 791 (1973)). Moreover, Georgia historically maintained county boundaries intact in part "to undermine the voting strength of counties with large black populations." J.S. App. 40a. The State has frequently split county boundaries in the Atlanta area (where both the court plan and the Illustrative Plan split *every* county), and in the 1970s the State did so outside the Atlanta area in Whitfield County, as the state appellees concede (Br. 24-25). Especially in light of the

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[11] The table showing the deviations in each district in the Johnson appellees' brief (at 43) contains two errors. First, the Second District in the court's plan had a deviation of -.23 (not -.023). Second, the deviations listed for the Sixth District are reversed; the deviation in the court's plan is .11 and the deviation in the Illustrative Plan is .04. The correct calculations for the average deviations in the two plans are .112% for the court's plan and .065% for the Illustrative Plan.

stringent standards governing court-ordered districting plans, the district court was not justified in adopting a plan that unnecessarily departs from "precise mathematical equality," *Kirkpatrick*, 394 U.S. at 530-531, in order to avoid the two county splits in the Illustrative Plan.[12]

4. *Section 5.* The Johnson appellees (Br. 37-42) and the state appellees (Br. 42-47) argue that our analysis of the retrogressive effect of the court's plan under Section 5 of the Voting Rights Act is mistaken. As we explained in our opening brief (U.S. Br. 43 n.25), this question seems largely theoretical here, since its resolution in the context of this case turns on essentially the same issues as does the resolution of the *Upham* v. *Seamon* and Section 2 claims. Nonetheless, insofar as this issue is of importance, appellees do not identify any error in our analysis.

The Johnson appellees (Br. 40) are mistaken in characterizing our argument as "contending the Section 5 benchmark to be however many minority districts Section 2 requires." To the contrary, the Section 5 benchmark is "the 1992 Plan, modified as necessary to cure its unconstitutional defects." U.S. Br. 42. In this case, that turns out to be a plan with two majority-minority districts—the same number required by Section 2. In other cases, however, the Section 5 benchmark could require a State to draw more or fewer districts than Section 2 does. For example, had the State never drawn more than one majority-minority district, the Section 5 benchmark could not have more than one majority-minority district. That would be true even if Section 2 required the State to draw additional districts.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed and the case should be remanded to the district court with instructions to develop and put in place a new plan that is consistent with constitutional one-person, one-vote requirements and that contains two compact majority-minority districts.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996

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[12] The Johnson appellees note (Br. 44) that the plan this Court found unconstitutional in *Miller* had a .93% overall population deviation. They then argue (*ibid.*) that "[b]ecause the district court was not charged with curing any unconstitutional deviations, *Upham* v. *Seamon* would arguably preclude any gratuitous changes to a district just to improve the population deviation." If appellees are suggesting that the district court was *precluded* from attempting to minimize the population deviation in the plan it drew, appellees are mistaken; the court was *required* to do so. Because the State simply cannot have a legitimate policy to have larger than minimum population deviations in its congressional districting plan, the fact that the State has previously adopted plans with larger than necessary deviations provides no basis for the district court to do so. See *Chapman* v. *Meier*, 420 U.S. 1, 26-27 (1975).

(5) (6)

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Supreme Court, U.S.
FILED
JUL 19 1996
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On Appeal from the United States District Court for the Southern District of Georgia

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BRIEF AMICUS CURIAE OF THE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF APPELLANTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

37 pp

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BRIEF AMICUS CURIAE OF THE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE[1]

The Georgia Association of Black Elected Officials ("GABEO") is an organization of more than 700 African-Americans elected to public office in Georgia. Its members include three United States Representatives and more than 40 state legislators, as well as hundreds of county and municipal officials. *Amicus* GABEO and its mem-

[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

bers have a direct interest in the legal standards that will govern federal district courts in the remedial phase of cases under *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*), *Miller v. Johnson*, 115 S. Ct. 2475 (1995), and their progeny. If remedial courts are allowed to exercise unfettered discretion, *amicus* fears that the power to draw congressional and legislative districts will shift dramatically away from the States, and partisan and factional interests of every stripe will seek to attain in federal court the political victories they were unable to win in their state legislatures or at the polls.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a long line of cases culminating in *White v. Weiser*, 412 U.S. 783 (1973), and *Upham v. Seamon*, 456 U.S. 37 (1982), this Court has established principles and procedures to constrain the discretion of federal courts at the remedial phase of redistricting litigation. The *Upham-Weiser* procedure gives the state legislature broad latitude to cure a judicially established violation. But if the State fails to produce a legal redistricting plan, the federal court, in fashioning a remedy, must begin with the State's *invalid* plan and may alter *only* those aspects of it that the court has specifically found to be unconstitutional or illegal. All other aspects of the State's plan must be left untouched, as they are presumed to reflect the legitimate policy choices of the State and its citizens. *See Upham*, 456 U.S. at 40-44 (*per curiam*); *Weiser*, 412 U.S. at 793-97.

The court below carved out an unprecedented and unwarranted exception to the *Upham-Weiser* standard. 922 F. Supp. 1556, 1559-61 (S.D. Ga. 1995). The three-judge District Court had declared unconstitutional the Second and Eleventh Districts in Georgia's 1992 congressional plan, 922 F. Supp. 1552, 1553-56 (S.D. Ga. 1995); 864 F. Supp. 1354, 1359, 1393 (S.D. Ga. 1994), and initially had indicated that, if the legislature

failed to remedy the violations, the court would adopt a plan "as narrowly conceived as possible to satisfy constitutional requirements and [to] cause minimal disruptions to the political processes of the State of Georgia." Order, Aug. 2, 1995; *accord* 864 F. Supp. at 1393. However, when the legislature failed to enact a substitute plan, the District Court (with one judge dissenting) reversed course and held that the State's 1992 plan could *not* form the basis for a proper remedy because it "more closely reflect[ed]" the intentions of the United States Department of Justice than those of the Georgia General Assembly. 922 F. Supp. at 1560; *see id.* at 1560-61, 1563; *see also id.* at 1563 & n.9 (also refusing to base its remedy on the State's *1991* plan, even though the General Assembly enacted that plan *before* the Justice Department had begun its review).

Having freed itself from the constraints that *Upham* and *Weiser* normally impose on a federal remedial court, the two-judge majority proceeded to redraw all eleven of Georgia's congressional districts, to pit two pairs of incumbents against each other (thus creating two open seats), and to move a fifth incumbent to a new district. In doing so, the District Court ran roughshod over the specific criteria the General Assembly had enunciated in its 1991 redistricting guidelines and had embodied in its 1991 and 1992 congressional maps. 922 F. Supp. at 1559-70 (remedial order and opinion); J.S. App. 41a-43a (court-imposed plan);[2] *see also Miller*, 115 S. Ct. at 2483 (citing the General Assembly's express criteria, including "preserving the core[s] of existing districts" and "avoiding contests between incumbents"). Even the District Court conceded that the changes it had imposed upon the 1992 map were "drastic." 922 F. Supp. at 1561.

The District Court's approach to its remedial task makes clear that the court misapprehended a key analyti-

[2] All references to J.S. (or J.S. App.) are to the jurisdictional statement in No. 95-1460 (or the appendix thereto).

cal distinction between vote-dilution and *Shaw* claims. A vote-dilution claim seeks to correct an imbalance in political and electoral opportunity. A remedy that fully cures that imbalance and offers all voters an equal opportunity to elect their preferred candidates may well alter the results of the next election. By contrast, a *Shaw* claim focuses upon an entirely different problem—the deliberate classification and separation of voters on the basis of race. Such racial classifications cause constitutional harm not because they dilute anyone's voting strength, but rather because "they convey the message that political identity is, or should be, predominantly racial." *Bush v. Vera*, 64 U.S.L.W. 4452, 4461 (U.S. June 13, 1996) (plurality opinion); *see also id.* at 4462 (*Shaw* violations cause "expressive harms"). A remedy that fully cures a *Shaw* violation, therefore, need not have *any* effect on electoral outcomes. Indeed, a *Shaw* remedy should not affect outcomes unless doing so is necessary to cure the violation; outcomes under an invalidated plan are presumptively consistent with state policy objectives, and must therefore be respected to the maximum extent possible. Thus, a federal remedial court in a *Shaw* case abuses its equitable discretion if it goes out of its way to redistribute political power by dramatically enhancing the voting strength of some groups at the expense of others, forcing certain incumbents to run against each other, and effectively "picking winners and losers." The court below committed precisely that error.

If the District Court's sweeping remedial order is affirmed, the *Upham-Weiser* constraints on federal remedial courts will be rendered largely meaningless in *Shaw* cases. Wherever the Justice Department, acting pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, is said to have "tainted" or "subvert[ed]" the districting process, 922 F. Supp. at 1560, 1563, federal remedial courts will be free to shunt aside legitimate state policy decisions and to redraw districts any way they see fit. Thus, *Shaw* litigation will give rise to a new and extraordinarily lenient remedial standard which will invite partisan and factional interests of all stripes to seek from the federal courts those political victories that they were unable to win in the halls of their state legislatures or at the polls. This enlargement of the federal judicial role transgresses fundamental principles, and should not stand.

By clarifying (and constraining) the scope of federal district courts' remedial authority, this Court can prevent *Shaw* litigation from degenerating into factional free-for-alls and thereby usurping the political role reserved to the States under our constitutional order. At the same time, clear guidance from this Court can foster a return to the sound redistricting principles and practices that prevailed before 1990.

ARGUMENT

This Court has repeatedly stated that *Shaw* claims are "analytically distinct" from vote-dilution claims, *Shaw I*, 509 U.S. at 652; *Miller*, 115 S. Ct. at 2485, but has had no occasion to explain how that distinction should affect a federal district court's remedial actions in a *Shaw* case. In recent months, three-judge courts in Georgia, Louisiana, Florida, and Texas have—in different ways—turned their backs on the remedial procedure established by this Court in *Upham* and *Weiser*.[3] Now that eight

[3] In *Hays v. Louisiana*, Nos. 92-1522, 95-1241, slip op. at 1-2, 24-27 (W.D. La. Jan. 5, 1996) (*per curiam*), *appeals dismissed as moot*, 64 U.S.L.W. 3848 (U.S. June 24, 1996), the three-judge District Court expressly *refused* to give the state legislature any opportunity to redraw its districting plan. In *Johnson v. Mortham*, No. TCA 94-40025-MMP, 1996 WL 297280, at *1 (N.D. Fla. May 31, 1996), although the three-judge District Court ordered a legislatively enacted remedial plan into effect, it refused to hold that the plan was constitutionally valid and expressly stated that challenges to the plan's constitutionality could "be brought in a separate lawsuit." In *Vera v. Bush*, C.A. No. H-94-0277 (S.D. Tex. July 11, 1996), the three-judge District Court, ruling from the bench, gave the parties only six days to settle the case and indicated a willingness to impose a court-drawn plan even though the Texas Legisla-

congressional districts in five States (Florida, Georgia, Louisiana, North Carolina, and Texas) have been invalidated under *Shaw* principles,[4] remedial issues are coming to the fore. This case provides the Court with a timely opportunity to reaffirm *Upham* and *Weiser* and to explain how they should be applied in *Shaw* cases.

I. UNDER *UPHAM* AND *WEISER*, FEDERAL COURTS REMEDYING UNCONSTITUTIONAL DISTRICTING PLANS MUST DEFER TO THE STATE, AND MAY DO *ONLY* WHAT IS NECESSARY TO REDRESS THE PARTICULAR INJURIES CAUSED BY THE CONSTITUTIONAL VIOLATION.

"Principles of federalism and separation of powers impose stringent limitations on the equitable power of federal courts." *Lewis v. Casey*, 64 U.S.L.W. 4587, 4599 (U.S. June 24, 1996) (Thomas, J., concurring). "The power of the federal courts to restructure the operation of local and state governmental entities is not plenary. It may be exercised only on the basis of a constitutional violation." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419-20 (1977); *see Freeman v. Pitts*, 503 U.S. 467, 489 (1992); *Rizzo v. Goode*, 423 U.S. 362, 377 (1976); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (*Milliken I*); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

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ture has been out of session and has had no opportunity to remedy the violations since this Court handed down its decision in *Bush v. Vera*, *supra*, on June 13. *See* Alan Bernstein, *Judges Warn They May Draw District Lines*, Houston Chron., July 12, 1996, at 1A.

[4] *See Bush*, 64 U.S.L.W. at 4454 (Texas Districts 18, 29, and 30); *Shaw v. Hunt*, 64 U.S.L.W. 4437, 4438 (U.S. June 13, 1996) (*Shaw II*) (North Carolina District 12); *Miller v. Johnson*, 115 S. Ct. at 2494 (Georgia District 11); *Johnson v. Miller*, 922 F. Supp. at 1553 (Georgia District 2); *Hays v. Louisiana*, *supra*, slip op. at 1, 24 (Louisiana District 4); *Johnson v. Mortham*, No. TCA 94-40025-MMP, 1996 WL 189235, at *27-*28 (N.D. Fla. Apr. 17, 1996, as modified June 6, 1996) (Florida District 3).

Once a discrete constitutional violation is found, a federal court is required to tailor the nature and scope of the remedy to fit the nature and extent of the violation. *See United States v. Virginia*, 64 U.S.L.W. 4638, 4647 (U.S. June 26, 1996); *Lewis*, 64 U.S.L.W. at 4590 (majority opinion); *Missouri v. Jenkins*, 115 S. Ct. 2038, 2049 (1995); *Brinkman*, 433 U.S. at 420; *Milliken v. Bradley*, 433 U.S. 267, 280-82 (1977) (*Milliken II*); *Milliken I*, 418 U.S. at 738, 744; *Swann*, 402 U.S. at 16. The remedial decree therefore must directly address and relate to "'the *condition* alleged to offend the Constitution.'" *Shaw v. Hunt*, 64 U.S.L.W. 4437, 4442 (U.S. June 13, 1996) (*Shaw II*) (quoting *Jenkins*, 115 S. Ct. at 2049); *see Freeman*, 503 U.S. at 487; *Rogers v. Lodge*, 458 U.S. 613, 628 (1982); *Milliken II*, 433 U.S. at 280-82; *Milliken I*, 418 U.S. at 738; *Swann*, 402 U.S. at 16. This Court has steadfastly refused to give the lower "federal courts a blank check to impose unlimited remedies upon a constitutional violator." *Jenkins*, 115 S. Ct. at 2058 (O'Connor, J., concurring).

Furthermore, "the federal courts in revising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken II*, 433 U.S. at 280-81; *accord Jenkins*, 115 S. Ct. at 2049, 2054; *Freeman*, 503 U.S. at 489; *Spallone v. United States*, 493 U.S. 265, 276 (1990). "Judicial authority enters only when local authority defaults." *Swann*, 402 U.S. at 16. "[O]verreaching by a federal district court simply cannot be tolerated in our federal system." *Lewis*, 64 U.S.L.W. at 4593 (Thomas, J., concurring).

These general principles of judicial restraint, equity, and federalism apply with particular force when federal courts invalidate state redistricting plans. The Constitution allocates to the States the primary responsibility for reapportionment. U.S. Const., art. I, § 2, cl. 1; *id.* § 4,

cl. 1; *see Bush*, 64 U.S.L.W. at 4465 (O'Connor, J., concurring); *Growe v. Emison*, 507 U.S. 25, 34 (1993); *Reynolds v Sims*, 377 U.S. 533, 586 (1964).

In *Upham*, 456 U.S. at 40-44, and *Weiser*, 412 U.S. at 793-97, this Court established a standard procedure for the remedial stage of redistricting cases, to ensure that federal courts respect these fundamental principles. After a district court declares a plan invalid, its first step ordinarily is to give the State a reasonable opportunity to draw a substitute. *Weiser*, 412 U.S. at 794-95; *Reynolds*, 377 U.S. at 586.[5] As Justice Powell explained, a plan enacted by the legislature is "likely to reflect a State's political policy and the will of its people more accurately than a decision by unelected federal judges." *Connor v. Finch*, 431 U.S. 407, 431 (1977) (dissenting opinion) (citing *Chapman v. Meier*, 420 U.S. 1 (1975)).[6]

[5] *See Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *Growe*, 507 U.S. at 34; *Upham*, 456 U.S. at 41-42; *McDaniel v. Sanchez*, 452 U.S. 130, 138, 150 n.30 (1981); *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (plurality opinion); *Sixty-seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 196 (1972) (*per curiam*); *Connor v. Williams*, 404 U.S. 549, 552 n.4 (1972); *Ely v. Klahr*, 403 U.S. 108, 114 & n.6 (1971); *Burns v. Richardson*, 384 U.S. 73, 84-85 (1966); *see also Bush*, 64 U.S.L.W. at 4460 (plurality opinion); *Miller*, 115 S. Ct. at 2488; *id.* at 2500 (Ginsburg, J., dissenting) (Both the majority and the dissenters "agree that federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions; as a rule, the task should remain within the domain of state legislatures.").

[6] In attempting to remedy its previous violation, the legislature has very broad discretion and is free to reconsider its goals and policies. *See Shaw II*, 64 U.S.L.W. at 4443 n.9 ("States retain broad discretion in drawing [remedial] districts . . . .") (citing *Voinovich*, 507 U.S. at 156-57; *Growe*, 507 U.S. at 32-37); *Bush*, 64 U.S.L.W. at 4460 (plurality opinion) ("States retain a flexibility that federal [remedial] courts . . . lack"); *cf. id.* at 4464 (O'Connor, J., concurring) ("fundamental concerns of federalism mandate that States be given some leeway"). For example, a legislature certainly could decide that it no longer wanted to preserve the cores of existing districts or to avoid contests between incumbents. *See Burns*, 384 U.S. at 83-85, 89 n.16. So long as the State enacts a new plan that remedies the violation and complies with the applicable federal and state constitutional and statutory provisions, it will become the governing law. *Wise*, 437 U.S. at 540 (plurality opinion); *Weiser*, 412 U.S. at 795; *Burns*, 384 U.S. at 85; *see also Voinovich*, 507 U.S. at 156 ("[T]he federal courts are bound to respect the State's apportionment choices unless those choices contravene federal requirements.").

If the State enacts no substitute plan, or if the plan it enacts is itself invalid, the court's second step is to request that the parties and *amici* submit proposed remedial plans. *See, e.g., Upham*, 456 U.S. at 38. The present case involves no dispute as to these first two steps.

The third step—which *is* at issue here—is for the court either to choose among the litigants' proposed plans or to draw its own remedial map (often with the help of a special master). But the district court's discretion at this third step is far more constrained than is the legislature's at the first step. *See Voinovich v. Quilter*, 507 U.S. 146, 156-57 (1993); *see also Bush*, 64 U.S.L.W. at 4487 (Souter, J., dissenting); *Connor v. Finch*, 431 U.S. at 415 ("[The task of] a federal court . . . left with the unwelcome obligation of performing in the legislature's stead, while lacking the [legislature's] political authoritativeness, . . . is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.'" (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)); *cf. Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in judgment) ("Federal courts [should not] attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socio-economic groups.").

A federal court "seeking to remedy an unconstitutional apportionment [must] right the constitutional wrong while minimizing disturbance of legitimate state policies." *Sixty-seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 202 (1972) (Stewart, J., dissenting). Federal courts "are never free to 'make' the policy choices underlying redistricting decisions, but must discover and faithfully apply the State's own choices. While the creation of state policy is political, its discovery and application presumably should not be." Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & Pol. 653, 664-65 (1988).

In essence, the remedial court must differentiate those aspects of the State's plan that are unconstitutional from those that reflect the State's legitimate political policies, and then eliminate the former while minimizing interference with the latter. *See Upham*, 456 U.S. at 43 ("An appropriate reconciliation of [the requirements of the Constitution with the goals of state political policy] can only be reached if the district court's modifications of a state plan are limited to those *necessary* to cure any constitutional or statutory defect." (emphasis added)); *Weiser*, 412 U.S. at 795 ("In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'") (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)).

In devising a narrowly tailored remedy—making *only* those changes "*necessary* to cure [the] . . . defect," *Upham*, 456 U.S. at 43 (emphasis added)—courts focus upon the concrete, particularized "injury-in-fact" caused by the invalid law. *See Lewis*, 64 U.S.L.W. at 4590 ("The remedy must . . . be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established."); *id.* at 4591 n.7 ("Courts have no power to presume and remediate harm that has not been established.").

In a vote-dilution case, voters who belong to a particular group claim to have been illegally disadvantaged by a districting plan. Their injury is, simply put, that the "wrong" representative was elected because the plan improperly enhanced the political strength of one identifiable group of voters, at the expense of the group to which the plaintiffs belong. *Cf. United States v. Saylor*, 322 U.S. 385, 386, 389 (1944) (right to vote protects against the diluting effect of ballot-box stuffing). For example, if voting is racially polarized and members of a sizable, predominantly black community have been fragmented and dispersed among several districts, the preferences and interests of whites will be systematically overrepresented, at the expense of blacks. *See Shaw II*, 64 U.S.L.W. at 4442 (citing *Johnson v. De Grandy*, 114 S. Ct. 2647, 2655 (1994)); *White v. Regester*, 412 U.S. 755, 765-70 (1973); *see also Bush*, 64 U.S.L.W. at 4482 n.3 (Souter, J., dissenting); *Voinovich*, 507 U.S. at 154-55 (minority vote-dilution claims focus "exclusively on the consequences" of redistricting and on "electoral outcomes"); *Growe*, 507 U.S. at 40-41 (unless minority vote-dilution plaintiffs can prove that their group (a) has the potential to elect its preferred representative in a new, remedial district, but (b) is unable to do so under the challenged districting plan, "there neither has been a wrong nor can be a remedy") (citing *Thornburg v. Gingles*, 478 U.S. 30, 50-51 & n.17 (1986)); *Gingles*, 478 U.S. at 93 (O'Connor, J., concurring in judgment) ("electoral success" is "the linchpin of vote dilution claims").

Any cure that adequately reflects different groups' undiluted voting strength—*e.g.*, uniting a fragmented black community within a single district—will likely alter the *outcome* of the next election. The federal court's remedy may result in the retirement or defeat of a particular incumbent and the election of a new candidate preferred by those minority voters whose political strength the previous plan diluted. Indeed, that is the very point of the

litigation: to change the composition of the relevant governing body by altering electoral results. As Point II *infra* explains, *Shaw* claims are entirely different, because they simply do not address electoral *outcomes*.

II. IN REMEDYING REDISTRICTING PLANS THAT UNCONSTITUTIONALLY CLASSIFY AND SEPARATE VOTERS ON THE BASIS OF RACE, A FEDERAL COURT MUST REDRAW LINES PREDOMINANTLY USING TRADITIONAL DISTRICTING CRITERIA AND MUST AVOID UNNECESSARILY REDISTRIBUTING POLITICAL POWER AND ALTERING LIKELY ELECTORAL OUTCOMES.

Shaw claims are not reverse discrimination claims. Here, for example, plaintiff-appellees do not argue that Georgia's 1992 plan minimized or diluted the voting strength of whites or of any other racial group. *See Shaw I*, 509 U.S. at 641; *see also De Grandy*, 114 S. Ct. at 2664 (O'Connor, J., concurring).

Rather, the claim here is that the State injured voters by using race as the predominant motivating factor in drawing district lines. *See Shaw II*, 64 U.S.L.W. at 4439 ("The constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." (quoting *Miller*, 115 S. Ct. at 2486)); *id.* at 4440 (quoting *Miller*, 115 S. Ct. at 2488); *Bush*, 64 U.S.L.W. at 4454-55 (plurality opinion); *id.* at 4464 (O'Connor, J., concurring). Specifically, the District Court found that Georgia had intentionally drawn the boundaries of its Eleventh and Second Congressional Districts so that blacks fell on one side of the lines and whites on the other[7]—rather

[7] *Cf. Bush*, 64 U.S.L.W. at 4458 n.* (plurality opinion) (focusing on "the difference [in racial composition] between areas just inside and just outside the district lines"); *id.* at 4455, 4459 (strictly scrutinizing district lines because they "separat[e] Hispanic voters from African-American voters on a block-by-block basis" and thereby "correlate almost perfectly" with computerized racial data).

than following pre-existing lines that define recognizable geographic or territorial units, such as counties, municipalities, townships, communities, media markets, neighborhoods, census tracts (or census block numbering areas),[8] local election precincts (or census voter tabulation districts), or natural (or man-made) geographic regions. 922 F. Supp. at 1553-56; *see Bush*, 64 U.S.L.W. at 4461 (plurality opinion) (criticizing districts because they "cut[] across pre-existing precinct lines and other natural or traditional divisions"); *see also* Bernard Grofman, Shaw v. Reno *and the Future of Voting Rights*, PS: Political Science & Politics, Mar. 1995, at 27, 30-31 (legislators should be able to explain to their constituents the boundaries of their districts in simple, commonsense terms, based on recognizable geographic referents).

The plaintiffs in a typical *Shaw* case allege that the State's race-based line-drawing—intentionally assigning black voters to one district and white voters to a separate district—creates an *implied* racial classification which (like an express racial classification) stigmatizes persons on the basis of their race and therefore is presumptively unconstitutional. *See Shaw I*, 509 U.S. at 642-49. Any harm proven in a *Shaw* case flows from this implied racial classification—not from the districting plan's effects on electoral outcomes. *See Bush*, 64 U.S.L.W. at 4461 (plurality opinion) ("[T]he ultimate constitutional values at stake involve the harms caused by the use of unjustified racial classifications . . . ."); *see also* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1184 n.35 (1996) ("[T]he harm 'is, quite literally, the drawing of lines based on race.'" (citation omitted)).

[8] Census tracts are designed to encompass relatively socially homogeneous populations, and they are typically bounded by prominent natural or man-made geographical features (*e.g.*, rivers or highways). *Wilson v. Eu*, 1 Cal. 4th 707, 718 (1992).

The cure for a *Shaw* violation is to "fix" the unconstitutional district's boundary, so that it is not based on race in substantial disregard of traditional districting criteria, such as respect for the pre-existing borders of counties, municipalities, communities of interest, or other recognizable geographic units. *See Miller*, 115 S. Ct. at 2488; *id.* at 2497 (O'Connor, J., concurring), *quoted in Bush*, 64 U.S.L.W. at 4454 (plurality opinion). Such a narrowly tailored cure would remedy any harm caused by the racial classification embodied in an electoral district: once the remedy is implemented, voters' placement within or without a particular district would be explained by their residence in a particular county (or municipality or community) rather than by the State's unconstitutional use of race. *See United States v. Hays*, 115 S. Ct. 2431, 2433, 2436-37 (1995); *Shaw I*, 509 U.S. at 641-42, 657-58; *see also Shaw II*, 64 U.S.L.W. at 4439.[9]

The redistricting approach proposed here is essentially a return to the traditional techniques that prevailed prior to the 1990s round of redistricting. *See Bush*, 64 U.S.L.W. at 4462 (plurality opinion). In combination with aggressive application of Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973, 1973c, three technical factors distinguished post-1990 congressional redistricting. *See* Grofman, *supra*, at 27. First, fear of liability under

[9] Given the extremely strict "one person, one vote" requirement mandated by Article I, Section 2 of the Constitution, *see Karcher v. Daggett*, 462 U.S. 725, 730-44 (1983), it may be impossible for the *entire* boundary of each congressional district to follow pre-existing lines. *See Connor v. Finch*, 431 U.S. at 419; *id.* at 429 (Blackmun, J., concurring in judgment). But a district is presumptively unconstitutional if the State (or federal remedial court) relied on race *in substantial disregard* of traditional districting criteria when placing "a *significant number* of voters within or without [that] particular district." *Miller*, 115 S. Ct. at 2488 (emphasis added); *see id.* at 2497 (O'Connor, J., concurring) (reliance on race "in substantial disregard" of traditional districting criteria triggers strict scrutiny), *quoted in Bush*, 64 U.S.L.W. at 4454 (plurality opinion).

Article I, Section 2's strict "one person, one vote" requirement frequently drove redistricters to cross county, city, and other socially meaningful lines in the search for perfect population equality. *See, e.g., Bush*, 64 U.S.L.W. at 4470 n.10 (Stevens, J., dissenting) ("Every one of Texas' 30 congressional districts contains precisely 566,217 persons. Of course, this precision could not have been accomplished without breaking apart counties, cities, neighborhoods, and even pre-existing voting precincts."); *see also Connor v. Finch*, 431 U.S. at 429 (Blackmun, J., concurring in judgment) ("To the extent that the attainment of precisely equal districts requires abandonment of longstanding political boundaries, gerrymandering is that much easier.").

Second, the Bureau of the Census—for the first time—provided racial data on a block-by-block level. *See Bush*, 64 U.S.L.W. at 4455 (plurality opinion). Because African-Americans (and, to a lesser degree, Hispanics) overwhelmingly vote for Democratic candidates, *see, e.g., id.* at 4457 (citing "evidence that 97% of African-American voters in and around the city of Dallas vote Democrat"), the Census Bureau's "unprecedentedly detailed racial data" effectively enabled redistricters to seek partisan advantage on a block-by-block basis, even though actual election data were only available by precinct. *Id.* at 4455.

And third, the computer revolution made it easy to draw numerous alternative districting plans, also on a block-by-block basis, and to assess immediately each districts' racial composition and partisan balance of power (in part, by inferring partisan data from racial data). *See id.* at 4455.

The 1990s redistricters' extensive use of the census block—which, as the Census Bureau's smallest geographic unit, typically contains fewer than a hundred persons—as the foundational "building block" for congressional districts was critical. On average, a congressional district contains fewer than a dozen counties, 40 incorporated

municipalities, 140 census tracts (and block numbering areas), and three or four hundred local election precincts (or voter tabulation districts)—but fully *sixteen thousand* census blocks.[10] As the number of building blocks realistically available to redistricters increased, the number of technically feasible districting plans—and hence the potential for political or racial manipulation—rose exponentially. Moreover, the extensive use of census blocks to define congressional district perimeters enabled redistricters to weave in and out, assigning individual blocks to particular districts on the basis of their racial composition.

The new technologies and data of the 1990s are here to stay, but their misuse can easily be prevented. So long as a district is built primarily from geographic units such as whole, undivided precincts, census tracts, municipalities, and counties, district boundaries will make sense to voters and candidates alike, and citizens cannot credibly claim they have been personally subjected to any governmental race-based classification. Indeed, precisely this approach was used in drawing the California congressional districts that withstood a *Shaw* challenge in *DeWitt v. Wilson*, 856 F. Supp. 1409, 1411, 1413-15 (E.D. Cal. 1994) (three-judge court) (upholding districts built entirely with undivided census tracts), *summarily aff'd in relevant part*, 115 S. Ct. 2637 (1995), *cited with approval in Bush*, 64 U.S.L.W. at 4454 (plurality opinion).

This approach should generally be followed when federal courts attempt to redraw an unconstitutional majority-minority district. That redrawing process will usually affect both the district's shape and its demographics (but not, of course, its total population). As for shape, the district will become less bizarre and more compact, as its perimeter is straightened out and thereby shortened (at least in relation to the district's total area). *See* Richard

[10] *See* U.S. Dep't of Commerce, Bureau of the Census, *Number of Geographic Entities of the United States* (Aug. 4, 1994).

H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 505 & n.203, 565 table 3, 571-73 table 6 (1993) (defining compactness in terms of the ratio of a district's area to the square of its perimeter), *cited in Bush*, 64 U.S.L.W. at 4455, 4458 (plurality opinion); *see, e.g., Johnson v. Mortham*, 1996 WL 297280, at *1 (ordering into effect a remedial district with a slightly larger geographic area, but a 55% shorter perimeter, than the invalid district it replaced).

As for demographics, a proper remedy usually will reduce the district's minority population and increase its white population. Often, the district will be transformed into a "majority-white" district, albeit one with a sizable minority population. *See, e.g., id.* (transforming a 55.0% African-American district into a 46.5% African-American district). Sometimes, the reduction in the minority group's percentage of the electorate will be so great that the minority-preferred incumbent will retain no realistic potential for reelection. Where such a result is unavoidable, the court may have no choice.

But in many other cases, such as this one, the district court will be faced with two or more proposed remedies (either submitted by the litigants, or drawn by the court or its special master), each of which draws district lines without excessively relying on race and largely adheres to the State's traditional districting criteria. Faced with such a choice, the court must minimize its intrusion into the State's political processes by rejecting the plans that would be most disruptive to electoral outcomes. In the *Shaw* context, unlike the vote-dilution context, the harm has nothing to do with electoral results, and therefore any *unnecessary* interference with those results would constitute a clear abuse of the federal court's equitable discretion. Thus, a properly fashioned *Shaw* remedy typically will alter a district's shape and demographics, but not its politics.

III. THE GEORGIA DISTRICT COURT ABUSED ITS DISCRETION BY UNNECESSARILY INJECTING ITSELF INTO THE STATE'S POLITICAL PROCESSES, OVERTURNING THE STATE'S SPECIFIC DISTRICTING POLICIES, AND SELECTING A PLAN THAT WAS LIKELY TO WREAK HAVOC ON GEORGIA'S CONGRESSIONAL DELEGATION, WHEN IT COULD HAVE CURED THE VIOLATION WHILE RESPECTING STATE POLITICAL POLICIES AND MINIMALLY AFFECTING LIKELY ELECTORAL OUTCOMES.

The District Court improperly revisited—and rejected—legitimate and longstanding redistricting policies of the State of Georgia. As a threshold matter, the District Court committed a serious error in concluding that it was free to ignore the state policy choices reflected in Georgia's legislatively enacted 1992 redistricting plan. That the specific contours of that plan may have been influenced by Department of Justice Section 5 objections is no reason to find the plan an inauthentic expression of state policy generally. Quite apart from the legislature's putative desire to create three majority-minority districts, the invalidated plan reflected other longstanding state policies. Some of those policies—for example, avoiding contests between incumbents and preserving the cores of existing districts—had been expressly endorsed by the Georgia General Assembly in its 1991 redistricting guidelines and had been consistently applied not only in the 1991 and 1992 districting maps, but in a series of congressional plans dating back more than half a century. Nothing about this Court's decision invalidating the 1992 plan renders those race-neutral policies less worthy of respect at the remedial stage. By rejecting them, the federal court usurped the General Assembly's role and vastly exceeded the scope of its own authority.

The evidence of the District Court's overreaching is powerful. The court expressly rejected several proper remedial plans submitted by defendant-intervenors and

their *amici*, and instead reached out to create a new map, from scratch, that largely ignored the State's traditional districting criteria and could unnecessarily wreak havoc on the composition of Georgia's congressional delegation.

A. Illustrative Plan "GA-PLAN-A" Is Constitutional.

One of the remedial plans before the District Court was "GA-PLAN-A," the "Illustrative Plan" submitted by defendant-intervenor the United States. J.S. App. 44a (map). GA-PLAN-A's congressional districts are contiguous, geometrically and functionally compact, and respectful of political subdivisions and of communities defined by actual shared interests, including those "communities that have a particular racial makeup." *Miller*, 115 S. Ct. at 2488, 2490. The court conceded that GA-PLAN-A contains a lower overall population deviation (0.19%) than the court-imposed plan (0.35%). 922 F. Supp. at 1561;[11] *see Weiser*, 412 U.S. at 786-88, 796-97 (reversing a district court order that had rejected the proposed remedial plan with the lowest population deviation); *Daggett v. Kimmelman*, 580 F. Supp. 1259, 1264-65 (D.N.J.) (three-judge court) (adopting the proposed remedial plan with the lowest population deviation, even though it split two municipalities), *summarily aff'd sub nom. Karcher v. Daggett*, 467 U.S. 1222 (1984).

But the court rejected GA-PLAN-A and called it "constitutionally defective" *solely* on the ground that it "split *numerous* counties outside of the metropolitan Atlanta area, apparently for racial reasons." 922 F. Supp. at 1561 & n.4 (emphasis added). The District Court misunderstood both the law and the facts. As explained *supra*, Article I, Section 2's strict population-equality requirement effectively mandates the splitting of some counties. *See Connor v. Finch*, 431 U.S. at 419 ("The

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[11] Five of the districts in the court-imposed plan—but *none* in GA-PLAN-A—deviate more than 0.10% from the ideal district population. *Compare* J.S. App. 43a *with id.* at 45a.

policy of maintaining the inviolability of county lines . . ., if strictly adhered to, must inevitably collide with the basic equal protection standard of one person, one vote.").

And, as to the facts, the District Court's characterization of GA-PLAN-A is plainly incorrect. GA-PLAN-A splits only *two* of the 139 counties outside the metropolitan Atlanta area, *see* J.S. App. 44a, and primarily for equal-population and other non-race-based reasons. The divided counties—Bibb and Muscogee—are two of the four most heavily and densely populated Georgia counties outside the metropolitan Atlanta area. *Cf. Bush*, 64 U.S.L.W. at 4455-56 (plurality opinion) (noting that "large, densely populated urban counties" are likely to be split among several congressional districts). Moreover, the governments of both Bibb and Muscogee Counties specifically *requested* that they be split, so that they would each have more than one Representative to stand up for their interests in Congress.[12] If merely splitting those two counties renders GA-PLAN-A "constitutionally defective" under *Shaw* and *Miller*, then application of the *Miller* standard surely *will* "throw into doubt" dozens of the Nation's 435 congressional districts. *Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring); *see id.* (*Shaw* subjects only "extreme instances of gerrymandering" to strict scrutiny). Because none of the districts in GA-PLAN-A can trigger strict scrutiny under *Shaw I* and its progeny, as properly understood, *see, e.g., Bush*, 64 U.S.L.W. at 4454-59 (plurality opinion); *id.* at 4464 (O'Connor, J., concurring); *Shaw II*, 64 U.S.L.W. at 4439-40, that plan

[12] Furthermore, in Bibb County, GA-PLAN-A's district lines are neither bizarre nor irregular, and its Eleventh District does not divide any census tracts. *Cf. DeWitt*, 856 F. Supp. at 1411, 1413-15. And splitting Muscogee County is necessary to keep intact the Army's Fort Benning, which lies on both sides of the Muscogee-Chattahoochee County border. By contrast, the District Court's blind allegiance to county boundaries led it to bisect Fort Benning —the State's largest military base and far and away the largest employer in the region.

would redress the constitutional infirmities in Georgia's congressional map no less than the court-imposed scheme.

B. The District Court Abused Its Discretion.

In choosing between GA-PLAN-A and its own plan, then, the court should have considered only two questions. *First*, which plan was more faithful to the legitimate districting criteria enunciated in the General Assembly's 1991 guidelines and embodied in the State's now-invalidated plan? *Second*, which plan was less disruptive to the likely outcomes of Georgia's 1996 congressional elections? On both points, GA-PLAN-A was demonstrably superior to the court-imposed scheme, and the District Court therefore abused its discretion when it selected the latter over the former.

GA-PLAN-A represented a "judicious and proper balancing" of the General Assembly's districting criteria. *DeWitt*, 856 F. Supp. at 1413. It fairly and legally reflected the voting strength of Georgia's minority citizens and of its white citizens, it preserved the cores of all eleven districts, it avoided contests between incumbents, *Miller*, 115 S. Ct. at 2483 (reciting the General Assembly's 1991 redistricting guidelines), and it could not have massively disrupted Georgia's congressional election results.

GA-PLAN-A left the homes of each of the eleven Representatives in a separate district, thus avoiding unnecessary contests between incumbents, and provided each of the incumbents at least some realistic opportunity to compete for reelection.[13] With respect to the two districts

[13] Specifically, the Eleventh District's Congresswoman, Cynthia A. McKinney, an African-American Democrat, could have run for reelection in a newly configured Eleventh District that contained the core of her old Eleventh, a 51.0% black voting-age population, and the home of no other incumbent Member of Congress. The Second District's Congressman, Sanford D. Bishop, Jr., also an African-American Democrat, could have run for reelection in a newly configured Second District that contained the core of his

declared unconstitutional, GA-PLAN-A redrew those districts such that white voters would have outnumbered black voters in both new districts.[14] But, in the newly configured districts, both incumbents (Representatives McKinney and Bishop) would have stood at least a fighting chance of reelection because they would have had the advantage of incumbency,[15] that advantage would not have been offset by having to run against another incumbent, and most of the voters in the new districts would have already been familiar with (and represented by) Representative McKinney or Bishop. And there is no doubt that the other nine incumbents, each of whom could have run in a largely familiar district, without facing another incumbent, and without having to move his home, would not have been greatly damaged or aided by GA-PLAN-A.

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old Second and a 42.0% black voting-age population, and that also contained the home of no other incumbent.

[14] GA-PLAN-A's Eleventh and Second Districts would likely have contained a significantly greater number of white voters than black voters because in Georgia, as in most of the South, whites register and turn out at a higher rate than blacks. As of 1990, blacks constituted about 25% of Georgia's voting-age population, but only 22% of its registered voters and less than 21% of its actual electorate. *See* U.S. Dep't of Commerce, Bureau of the Census, *Voting and Registration in the Election of November 1988*, Ser. P-20, no. 440 (1989); *Congressional Districts in the 1990s* 827 (1993); *Quiet Revolution in the South* 102 (Chandler Davidson & Bernard Grofman eds., 1994); *see also* 864 F. Supp. at 1392 (blacks were 60.4% of the voting-age population but only 57% of the registered voters in Georgia's Eleventh District); Mark Sherman, *State Redistricting*, Atlanta J. & Const., July 16, 1995, at 2G (blacks were 52.3% of the voting-age population but only 45% of the registered voters in the Second District).

[15] Political scientists estimate that the incumbency advantage, over the last few decades, has varied between 6 and 12 percentage points. *See, e.g.*, Gary King & Andrew Gelman, *Systemic Consequences of Incumbency Advantage in U.S. House Elections*, 35 Am. J. Pol. Sci. 110, 112-16 (1991).

By contrast, the court-imposed plan—supposedly designed to remedy a constitutional violation that does *not* focus on electoral outcomes[16]—ignored the State's legitimate political policies and needlessly risked wreaking havoc on the composition of its congressional delegation. Although Georgia had not placed two Members of Congress in the same district since 1931 (when federal census results shrank Georgia's congressional delegation from twelve members to ten and thereby forced the pairing of incumbents), the court below dismissed Georgia's policy of "avoiding contests between incumbents," *Miller*, 115 S. Ct. at 2483, as "inherently [too] political" and "not [a] predominant factor[] the state has considered in the past." 922 F. Supp. at 1564 n.10, 1565. *Compare Bush*, 64 U.S.L.W. at 4456 (plurality opinion) ("incumbency protection" and "'avoiding contests between incumbent [Representatives]'" are legitimate redistricting goals) (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983), and citing *Weiser*, 412 U.S. at 797, and *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966)); *Johnson v. Miller*, No. Civ.A. CV 196-40, 1996 WL 288936, at *3 n.14, *20 (S.D. Ga. May 24, 1996) (three-judge court[17]) (In Georgia, incumbency protection is "a traditional redistricting principle" that "figure[s] greatly in the drawing of a district, whether the district is majority white or black, and likewise whether the incumbent is white or black."). The court then went on to place four incumbents in two districts, thereby unnecessarily creating two open seats.

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[16] Although plaintiff-appellee George L. DeLoach is the white Democrat who McKinney narrowly defeated in the 1992 runoff election, he brought the present action in his capacity as a voter, not as a failed candidate for Congress. Successful *Shaw* claims in Texas and Florida also were brought by unsuccessful congressional candidates. *See Vera v. Richards*, 861 F. Supp. 1304, 1340 (S.D. Tex. 1994) (three-judge court), *aff'd sub nom. Bush v. Vera*, *supra*; *Johnson v. Mortham*, 915 F. Supp. 1529, 1534 (N.D. Fla. 1995) (three-judge court).

[17] This three-judge District Court is not the same court whose decision is on appeal here.

General election contests pitting incumbent Democrats against incumbent Republicans were averted only when one of the incumbents decided to run in a district where he did not live and two other incumbents moved to new homes in newly created open districts.[18]

The District Court claimed that, by basing ten of its districts on Georgia's *1982* plan, 922 F. Supp. at 1562-65, it was being faithful to the State's announced policy of "preserving the core[s] of *existing* districts," *Miller*, 115 S. Ct. at 2483 (emphasis added). As this Court explained in *Weiser*, however, that particular policy is "aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives." 412 U.S. at 791. The State's policy aims could hardly be furthered by a court-imposed scheme that defers to a plan from the *1980s* and places in jeopardy the seats of nearly half the members of Georgia's *present* congressional delegation.[19]

Two of the Members of Congress placed in districts with other incumbents are Representatives McKinney and Bishop. When they first ran for Congress in 1992, neither could win the Democratic primary outright, and

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[18] Not surprisingly, all this disruption caused considerable confusion among the voters, as well as the candidates, *see* Charmagne Helton, *New Congressional Lines Spell Confusion for Voters*, Atlanta J. & Const., June 15, 1996, and may have contributed to the extraordinarily low turnout in the July 9 primaries. *See* Clarence Page, *Test Run on "Fair" Representation*, Chicago Trib., July 14, 1996, at 15.

[19] Of course, all eleven incumbents may ultimately prevail in the 1996 elections, given the advantages of incumbency and the uncertainty that this case, and this appeal, have cast over potential challengers and their supporters. But the point here is that the District Court went out of its way to draw a plan that *could potentially* wreak havoc on Georgia politics, while it expressly rejected a far less disruptive plan.

their victories in the runoff elections were narrow, as their white opponents received overwhelming support from voters in heavily white precincts. *See* U.S. Exh. 24, tables 3, 4, 10. In 1994, both were renominated in the primaries, without a runoff. In the 1994 general elections, Congresswoman McKinney and Congressman Bishop garnered 65.6% and 66.2% of the vote, respectively, even though the voting-age populations of their districts were only 60.4% and 52.3% black, respectively. Philip D. Duncan & Christine C. Lawrence, *Congressional Quarterly's Politics in America* 344, 365 (1995); *Congressional Districts in the 1990s* 203 (1993).[20] Their success was doubtless attributable both to the advantages of incumbency *and* to the lessening of racial polarization, as once-reluctant white voters saw—for the first time—that their interests could be vigorously represented in Washington by African-American Members of Congress.[21] Thus, it is clear that in 1996 Congresswoman McKinney and Congressman Bishop—with two more years of seniority and public service behind them, and with their proven willingness "to pull, haul, and trade to find common political ground," *De Grandy*, 114 S. Ct. at 2661—could potentially have been elected by the narrowly majority-*white* electorates in the reconfigured Eleventh and Second Districts of GA-PLAN-A.[22]

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[20] Similarly, Atlanta's fifth-term Congressman, John Lewis, received 69.1% of the vote in a district whose voting-age population was only 57.5% black. Duncan & Lawrence, at 351; *Congressional Districts in the 1990s* at 203.

[21] *Cf.* Tim R. Sass & Stephen L. Mehay, *The Voting Rights Act, District Elections, and the Success of Black Candidates in Municipal Elections*, 38 J.L. & Econ. 367, 389-90 (1995) (statistical analysis attributing the growing success of black candidates "to their adoption of moderate positions that attract white voters" and to slow, but significant, "changes in [white voters'] racial attitudes," as well as to the creation of new majority-minority districts).

[22] *Amicus* is not arguing here for the creation of so-called "influence districts" in which minority voters are sufficiently numerous to *influence*, but not alter, election results. *See Growe*, 507

The court-imposed plan, however, placed Congresswoman McKinney and Congressman Bishop in districts whose voting-age populations are only 32.8% and 22.5% black, respectively. Congressman Bishop subsequently moved to a new district with a 35.1% black voting-age population. No African-American has *ever* been elected in Georgia for Congressman, State Senator, or State Representative from any district with such a low black percentage.[23] *See* Joint Center for Political and Economic Studies, *National Roster of Black Elected Officials* (1995). And no African-American has *ever* been elected to Congress from such a district in *any* of the eleven former States of the Confederacy. *See American Leaders 1789-1991* (Colleen McGuiness ed., 1991); Duncan & Lawrence *passim*. Breaking these unfortunate precedents would have been particularly difficult for an African-American candidate who would have had to expend resources in the summer to avoid a runoff election for the Democratic nomination, *see* Ga. Code Ann. § 21-2-501, only to face a well-funded Republican *incumbent* Member

U.S. at 41 n.5; *cf.* 922 F. Supp. at 1567-68. Rather, *amicus* is simply pointing out the empirical fact that, although Georgia's racial cleavages often "necessitate majority-minority districts to ensure equal political and electoral opportunity," in GA-PLAN-A's Eleventh and Second Congressional Districts—where white voters would constitute a narrow majority of the electorate—African-American citizens *might* be "able to form coalitions with [white] voters . . . to elect candidates of their choice," particularly when those candidates are incumbent Members of Congress who have consistently striven to represent *all* of their constituents regardless of race. *De Grandy*, 114 S. Ct. at 2661. As Justice Kennedy noted in *De Grandy*, "[t]he assumption that majority-minority districts elect *only* minority representatives, or that majority-white districts elect *only* white representatives, is false as an empirical matter." *Id.* at 2665 (concurring opinion) (emphases added).

[23] The District Court credited expert statistical testimony showing that a district with no incumbent will elect a black candidate if its population of registered voters is 55% black, but will elect a white candidate if that figure falls to 50% or less. *See* 922 F. Supp. at 1568; *cf.* J.S. 18-22.

of Congress in the fall campaign.[24] Although that scenario was averted when Congressman Bishop moved 80 miles from Columbus to Albany and a Republican incumbent chose to run in a district where he does not live, it could have been avoided altogether, had the District Court stayed within the scope of its remedial authority and simply adopted GA-PLAN-A.

Appellees may argue that Congresswoman McKinney and Congressman Bishop somehow "deserve" this fate because their incumbencies are "tainted" by the constitutional error that the Justice Department forced upon Georgia's General Assembly. *See* 922 F. Supp. at 1560. That argument, however, ignores the facts. At any time in the two years since the court below struck down Congresswoman McKinney's district, the Georgia General Assembly could have mooted this case by redrawing the State's congressional map, adopting any legal configuration it desired. *Cf. Louisiana v. Hays*, 64 U.S.L.W. 3848 (U.S. June 24, 1996) (summarily dismissing appeals as moot). It consistently refused to do so, even when the District Court indicated that, if the legislature failed to act, it would adopt a "narrowly conceived" plan with "minimal disruptions to the political processes of the State of Georgia." Order, Aug. 2, 1995; *accord* 864 F. Supp. at 1393. By repeatedly declining to adopt *any* substitute plan, much less one resembling the plan imposed by the court below, the State of Georgia has demonstrated its unwillingness to undermine Congresswoman McKinney, Congresman Bishop, or the constituents—black and white—who they so ably represent.

[24] General elections, rather than partisan primary or runoff elections, typically present the greatest threat to incumbents. *See* Daniel Hays Lowenstein, *Election Law* 656, table 15.1 (1995) (from 1946 to 1994, incumbent Representatives were three-and-a-half times as likely to lose in general elections as in primaries).

Georgia's African-American Representatives have begun attaining considerable seniority in the House,[25] and their service to the State of Georgia and its citizenry has earned each of them the electoral support of a strong majority of black voters and of a significant and growing minority of white voters within their old districts. Indeed, their performance as public servants has challenged racial stereotypes held by whites and blacks alike, and has even begun to reverse the racial polarization that has marred politics in the State of Georgia for more than two centuries. Their efforts to "carry us [toward] the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire," *Shaw I*, 509 U.S. at 657—must not be jeopardized by an overzealous federal district court that got itself needlessly entangled in the "political thicket." *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J.).

IV. AFFIRMANCE OF THE DECISION BELOW WILL CONVERT *SHAW* LITIGATION INTO A POWERFUL WEAPON FOR PARTISAN AND FACTIONAL INTERESTS THAT SEEK TO WIN IN FEDERAL COURT THE POLITICAL VICTORIES THEY WERE UNABLE TO ATTAIN IN THEIR STATE LEGISLATURES OR AT THE POLLS.

Shaw litigation is now reaching a critical juncture. In addition to the two Georgia districts, six of the Nation's most bizarrely shaped and non-compact congressional districts[26] have been struck down. *See* cases cited *supra* in

[25] In the Georgia delegation, Congressman Lewis is the second most senior member (behind Speaker Newt Gingrich), and Congresswoman McKinney and Congressman Bishop are tied for third.

[26] Using the statistical measure of compactness cited favorably in *Bush*, 64 U.S.L.W. at 4459 (plurality opinion) (citing Pildes & Niemi, *supra*, at 565, table 3 (listing districts' "perimeter scores")), six of the Nation's seven least compact majority-minority districts have already been struck down, and the ninth least compact (Illinois

note 4. Federal courts have just begun turning to the question of remediation.

If this Court affirms the decision below, unbridled discretion on the part of *Shaw* remedial courts will invite manipulation by partisan and factional interests. Because it is exceedingly difficult to attack a redistricting scheme on *non*-racial grounds, *see, e.g., Davis v. Bandemer*, 478 U.S. at 132-33, 139 (plurality opinion); *Badham v. Eu*, 694 F. Supp. 664, 667-72 (N.D. Cal. 1988) (three-judge court), *summarily aff'd*, 488 U.S. 1024 (1989), political parties, factions, and interest groups have an incentive to couch their grievances in racial terms.[27] Absent strict limits on remedial discretion in *Shaw* cases, partisan manipulators surely will seize the opportunity to gain from federal courts remedying *Shaw* violations what they were unable to gain through the State's normal political processes. The remedial phases of *Shaw* cases will quickly degenerate into political free-for-alls, and a doctrine born of the desire to constrain the Federal Government's "short-sighted and unauthorized" intrusions into state politics, *Miller*, 115 S. Ct. at 2494, will instead have opened the way to the wholesale federalization of the redistricting process.

That scenario need not come to pass. The approach to *Shaw* remedies outlined here respects the constitutionally mandated role of the States in redistricting and comports with fundamental principles of federalism and judicial restraint. And, unlike the approach taken by the court

District 4) has been upheld by a three-judge district court. *See King v. State Bd. of Elections*, No. 95-C-827, 1996 WL 130439, at *29 (N.D. Ill. Mar. 15, 1996).

[27] *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 Sup. Ct. Rev. 245, 251; *see also* Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 Harv. L. Rev. 13, 66 n.355 (1995); Richard H. Pildes, *The Politics of Race*, 108 Harv. L. Rev. 1359, 1378-90 (1995) (book review).

below, it holds forth the promise of eliminating the Nation's "most egregious racial gerrymanders," *Shaw I*, 509 U.S. at 641, *without* undermining the very persons whose efforts to build cross-racial coalitions and to "find common political ground" are helping to "hasten the waning of racism in American politics." *De Grandy*, 114 S. Ct. at 2661.

CONCLUSION

Accordingly, this Court should reverse the judgment of the District Court and remand the case with instructions to implement a remedial plan that is narrowly tailored to cure the constitutional violations found in the State's 1992 plan.

Respectfully submitted,

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MOTION FILED
AUG 2 1996

(9) (9)

Nos. 95-1425 and 95-1460

In the Supreme Court of the United States October Term, 1995

LUCIOUS ABRAMS, JR., *et al.* and
THE UNITED STATES OF AMERICA,
Appellants,

v.

ZELL MILLER, *et al.*,
Appellees,

and

DAVIDA JOHNSON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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38 pp

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of appellees, Zell Miller, *et al.*, and Davida Johnson, *et al.* Consent to the filing of this brief has been granted by counsel for appellants Abrams, for the United States, and for the Georgia State appellants Miller, Howard, and Massey. Those letters of consent have been lodged with the Clerk of this Court. Counsel

for appellant Murphy has failed to respond to requests for consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the voting rights arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases before this Court including *Lopez v. Monterey County, California*, Docket No. 95-1201; *Bush v. Vera*, 116 S. Ct. 1941, 1996 WL 315857 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894, 1996 WL 315870 (1996); *Louisiana v. Hays*, ___ U.S. ___, 115 S. Ct. 2431 (1995); Adarand v. Pena, __U.S.__, 115 S. Ct. 2097 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); and *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. 419 (1991).

PLF believes that racial classifications by government, both in the voting rights context and otherwise, are inherently suspect and, absent extraordinary circumstances, unconstitutional. This is particularly true of congressional districts gerrymandered on the basis of race. PLF also believes that appellants' interpretation of the Voting Rights Act would unconstitutionally require racially proportional representation in redistricting and that if the only possible interpretation of

the Voting Rights Act does require racially proportional representation, the Act itself must be struck down as unconstitutional. These points may not be adequately covered by the parties whose interests are necessarily directed toward the particular districts at issue. PLF, with its extensive experience briefing the broader implications of the Voting Rights Act, is uniquely situated to analyze the issues involved in this case and to bring a wider scope of policy considerations to this Court.

For the foregoing reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

DATED: August 2, 1996.

Respectfully submitted,

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Nos. 95-1425 and 95-1460

In the Supreme Court of the United States October Term, 1995

LUCIOUS ABRAMS, JR., *et al.*, and

Appellants,

v.

ZELL MILLER, *et al.*,

Appellees,

and

DAVIDA JOHNSON, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellees, Zell Miller, *et al.*, and Davida Johnson, *et al.* As noted in the accompanying motion, all parties but one have consented to the filing of this amicus brief. The letters of consent have been lodged with the Clerk of the Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the voting rights arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases before this Court including *Lopez v. Monterey County, California*, Docket No. 95-1201; *Bush v. Vera*; 116 S. Ct. 1941, 1996 WL 315857 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894, 1996 WL 315870 (1996); *Louisiana v. Hays*, ___ U.S. ___, 115 S. Ct. 2431 (1995); *Adarand v. Pena*, ___ U.S. ___, 115 S. Ct. 2097 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); and *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. 419 (1991).

PLF believes that racial classifications by government, both in the voting rights context and otherwise, are inherently suspect and, absent extraordinary circumstances, unconstitutional. This is particularly true of congressional districts gerrymandered on the basis of race.

OPINION BELOW

The opinion of the Southern District of Georgia, drawing congressional district lines without resort to racial gerrymandering, is reported at *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga. 1995).

STATEMENT OF THE CASE

This case is the fourth in a set of cases beginning in 1994 relating to Georgia's congressional districting scheme. *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994) (*Johnson I*) struck down Georgia's Eleventh Congressional District as unconstitutional. This Court affirmed that decision in *Miller v. Johnson*, __ U.S. __, 115 S. Ct. 2475 (1995) (*Johnson II*) and remanded. The plaintiffs then added some new plaintiffs from the Second Congressional District and the District Court declared that district unconstitutional as well. *Johnson v. Miller*, 922 F. Supp. 1552 (S.D. Ga. 1995) (*Johnson III*). Finally, the case which is the subject of this appeal is the remand decision from *Johnson II*, in which the District Court redrew the Georgia Congressional District map. *Johnson v. Miller*, 922 F. Supp. 1556 (*Johnson IV*).

Section 5 of the Voting Rights Act requires Georgia to obtain either administrative preclearance by the Attorney General or approval by the United States District Court for the District of Columbia of any change in a "standard, practice, or procedure with respect to voting" made after November 1, 1964. 42 U.S.C. § 1973(c). The preclearance mechanism applies to congressional redistricting plans, *Beer v. United States*, 425 U.S. 130, 133 (1976), and requires that the proposed change "not have the purpose and ... not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973(c). "[T]he purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. Between 1980 and 1990, one of

Georgia's 10 congressional districts was a majority-black district. After the 1990 census, however, Georgia was allotted an additional congressional district. *Johnson II*, 115 S. Ct. at 2483.

The additional district required the Georgia Legislature to redraw the state's congressional districts. Twice the Legislature submitted maps to the Department of Justice (DOJ) for preclearance, each map containing two majority-black districts. Each time, the DOJ rejected the plans, relying instead on a map drawn by the American Civil Liberties Union (ACLU) which would create three majority-black districts. Because Georgia's black population outside Atlanta is widely dispersed, the ACLU plan contained racial gerrymandering of the worst sort. Nonetheless, the DOJ, following its "max-black" policy, demanded that the Georgia Legislature accept the ACLU plan. *Johnson II*, 115 S. Ct. at 2483-84.

Thus coerced, the Georgia Legislature capitulated, enacting the ACLU plan with only minor modifications. Among its other deficiencies,

> [t]he populations of the Eleventh [District] are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors.
>
> The dense population centers of the approved Eleventh District were all majority-black, all at the periphery of the district, and in the case of Atlanta, Augusta and Savannah, all tied to a sparsely populated rural core by even less populated land bridges. Extending from Atlanta to the Atlantic, the Eleventh covered 6,784.2 square miles, splitting eight counties and five municipalities along the way.

Johnson II, 115 S. Ct. at 2484. Nevertheless, the plan was precleared and elections held. *Id.* Subsequently, white voters in the Eleventh District sued to have the district struck down as a racial gerrymander. On appeal, this Court found the racial gerrymander violated the Fourteenth Amendment equal protection guarantee. *Johnson II*, 115 S. Ct. at 2486. This Court held that race was the predominant force guiding the redistricting and that the DOJ's "max-black" agenda was not a compelling state interest sufficient to justify such racial gerrymandering under strict scrutiny. This Court specifically repudiated the DOJ's interpretation of the Voting Rights Act as requiring as many minority-majority districts as could possibly be contrived. *Johnson II*, 115 S. Ct. at 2491. The Court then remanded the case back to the District Court (*id.* at 2494), which, in turn, asked the Georgia Legislature to come up with a new, constitutional, plan. *Johnson IV*, 922 F. Supp. at 1559.

The Georgia Legislature failed to draw a new map, so the task fell back to the court. *Id.* The District Court drew up a map which contained that same single majority-minority district in Atlanta that had always existed and declined to create any other majority-minority districts in the state. *Johnson IV*, 922 F. Supp. at 1566. The court was guided by the need to (1) comply with one-person-one-vote requirements; (2) keep counties and precincts intact as much as possible; and (3) keep core communities of interest together. The court was not particularly concerned with protecting incumbents or other political concerns. The court further determined that its plan did not contravene the Voting Rights Act requirements. *Johnson IV*, 922 F. Supp. at 1566-67.

Black voters appealed the plan to this Court, which noted probable jurisdiction on May 20, 1996.

SUMMARY OF ARGUMENT

Appellants seek a reversal of the decision below on an interpretation of the Voting Rights Act which would unconstitutionally require racially proportional representation in redistricting. The court below correctly rejected such an interpretation of the Act. The Act originally was aimed only at discriminatory voting procedures which denied blacks the right to cast their ballots. Although the 1982 amendments to the Act included those procedures which had racially discriminatory "results" (but not necessarily "intent"), it explicitly repudiated proportional representation by race. However, the appellants would require an interpretation of the Act requiring proportional representation. Thus, this Court should affirm the District Court's opinion which properly drew congressional districts in a nondiscriminatory manner and which repudiated appellants' attempts to impose proportional representation on the Georgia electorate.

Alternatively, if this Court holds that the Act, as currently written, cannot be interpreted in any way other than to require such proportional representation, the Act itself must be struck down as unconstitutional. Mandated proportional representation is equivalent to the strict racial quota systems found by this Court to be abhorrent to the Constitution. It segregates individuals into racial clans, inhibiting the democratic tenets of coalition and compromise. Proportional representation fosters politicians who represent races rather than constituents and prevents broad-based minority power by limiting their influence to a few "majority-minority" districts. Finally, proportional representation makes the patently false and pernicious assumption that

all minorities think alike and that only a minority can properly represent minority interests.

ARGUMENT

I

APPELLANTS' INTERPRETATION OF THE VOTING RIGHTS ACT WOULD UNCONSTITUTIONALLY REQUIRE RACIALLY PROPORTIONAL REPRESENTATION IN REDISTRICTING

In 1964, Dr. Martin Luther King proclaimed that "[o]nly with the growth of an enlightened electorate, white and Negro together, can we put a quick end to this century-old stranglehold of a [racist] minority on the nation's legislative processes." M. King, WHY WE CAN'T WAIT 149-50 (1964). Dr. King's words became legislative action less than a year later with the passage of the Voting Rights Act. "The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men," proclaimed President Lyndon Johnson upon signing the Act into law. S. Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics*, 3-4 (1985).

A. Original Intent of the Voting Rights Act

As stated in its preamble, the Act was intended "[t]o enforce the fifteenth amendment to the Constitution of the United States." *See Allen v. State Board of Elections*, 393 U.S. 544, 588 (1969) (Harlan, J., concurring in part and dissenting in part). Section 2 of the Act was largely uncontroversial and was seen only as a restatement of this Civil War Amendment. *Chisom*, 501 U.S. at 392; *City of Mobile v. Bolden*, 446 U.S. 55, 60-62 (1980). Pursuant to

this constitutional power, the statute was aimed at discriminatory voting procedures which continued to deprive blacks of access to the ballot, such as literacy tests and "grandfather clauses." *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993). Then Attorney General Katzenbach repeatedly emphasized that the sole ambition of the Act was getting people registered. *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 145 (1978) (Powell, J., concurring in part and concurring in the judgment). Although the Act constituted an "uncommon exercise of congressional power," *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), and a "substantial departure ... from ordinary concepts of our federal system," *Hearings on S. 407, et al., Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess. 536 (1975) (testimony of J. Stanley Pottinger), its *limited* scope made it proper legislation pursuant to the Fifteenth Amendment. *See, e.g.*, *City of Mobile*, 446 U.S. at 60-61.

Three decades later, "the gradual workings of the original law" have been remarkably successful in meeting its goals: "the enrollment of minority voters, the large-scale entry of minority voters into the rank and file of the political parties, the entry of minority candidates into politics, and a growing receptiveness of a predominantly white electorate to minority candidates." T. O'Rourke, *The Voting Rights Paradox* in, CONTROVERSIES IN MINORITY VOTING 109 (Grofman & Davidson, eds., 1992) (Paradox); *see also Holder v. Hall*, __U.S.__114 S. Ct. 2581, 2593 (1994) (Thomas, J., concurring in the judgment).[1]

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[1] Blacks who have won elections with white support include Douglas Wilder, lieutenant governor and later governor of Virginia; David Dinkins, mayor of New York City; and (continued...)

The Act, however, did not and could not reach vote "dilution" and, in particular, racial gerrymandering claims. *Holder*, 114 S. Ct. at 2593-94 (Thomas, J., concurring in the judgment). Drawing district lines must be distinguished from the basic process of allowing a citizen to vote: registering, casting a ballot, and having it counted. *Id.* at 2603. This dichotomy reflects the different bases of the different types of claims. As noted, the Act derived from the Fifteenth Amendment, while gerrymandering claims are cognizable

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[1] (...continued)
Norm Rice, mayor of Seattle. Senator Edward Brooke's victory in 1966 was a harbinger for the elections to Congress of other blacks from majority-white constituencies. George Collins was elected in 1970 from a 42% black Chicago district and Ronald Dellums was elected for a 70% white district. Minorities continued to be elected thereafter. For example, Andrew Young (1972), Harold Ford (1974), Alan Wheat (1982), Katie Hall (1982), and Gary Franks (1990) were all elected from majority-white districts. Moreover, the latter group of districts differed from the traditionally liberal constituencies in Massachusetts and Berkeley, California, that sent Brooke and Dellums to Washington. Since the early 1970s a much larger group of black representatives--Barbara Jordan (1972), Julian Dixon (1978), Mickey Leland (1978), Mervyn Dymally (1980), Floyd Flake (1986), and Craig Washington (1989)--have been elected in districts where no racial group constitutes a voting-age majority. Others, such as William Clay (1968) and Charles Rangel (1970), held their seats as their majority black constituencies became either majority-white or became a plurality. By 1988, 39% of the blacks in Congress represented districts that were less than 50% black. Swain, *Some Consequences of the Voting Rights Act*, in B. Grofman and C. Davidson, CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE (The Brookings Institution) at 293 n.20 (1992).

only under the Fourteenth Amendment. *See Voinovich v. Quilter*, 507 U.S. 146 (1993); *Beer v. United States*, 425 U.S. at 142-43 n.14.

Furthermore, the Act, in its original and amended form, did not call for proportional racial representation. In fact, it explicitly disavowed any such intent: "[N]othing in this section established a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). Members of this Court have recognized this prohibition both before and after the 1982 amendments to the Act. *See, e.g., City of Mobile*, 446 U.S. at 65 (opinion of Justice Stewart for the Court); *Holder*, 114 S. Ct. at 2597 (Thomas, J., concurring in the judgment). The Act simply was not intended or expected to create proportional representation by race.

B. Executive and Legislative Branches of Government Have Interpreted and Applied the Act to Require Unconstitutional Racial Representation

The interpretation of the Voting Rights Act advocated by the appellants in this case and rejected by the court below directly contravenes the Act's legislative language and calls for proportional racial representation. This interpretation is grounded on a 25-year history (1968-1993) of legislative, executive, and judicial pronouncements encouraging proportional representation. As this Court has recently held in *Shaw v. Reno*, 509 U.S. 630, this old interpretation is incorrect.

First, no fewer than six justices of this Court have recognized that the pre-*Shaw* and *Johnson II* interpretation of the Act creates proportional representation. In *Thornburg v. Gingles*, 478 U.S. 30, 97 (1986), Justice O'Connor, joined by Chief Justice Burger, and Justices Rehnquist and Powell stated that through its interpretation, "the Court is requiring a form of proportional representation. *Id.* at 85, 91. In

Holder, Justice Thomas and Justice Scalia agreed that the Act as interpreted and applied requires proportional racial representation. 114 S. Ct. at 2598-600 (Thomas, J., concurring in the judgment). Whether expressly stated by present and former members of the Court or "hidden" within the morass labeled "totality of the circumstances," *see* A. Thernstrom, WHOSE VOTES COUNT? 127 (Harvard University Press, 1987) (Thernstrom), the logical extension of the Act as interpreted is racial proportionality in elections.

Second, experts and legislators at the time of the 1982 amendments to the Voting Rights Act believed that racial proportionality would result. According to Duke Law Professor Donald Horowitz, "[t]he only way to judge the effect [of a redistricting scheme] will be to see whether minority voters have representatives in proportion to their population in that jurisdiction." *Hearings on S. 53, et al., Bills to Amend the Voting Rights Act of 1965, Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 2d Sess. 1309 (1982) (Senate Hearings); *see also id.* at 1340 (testimony of Professor James Blumstein). Some congressional witnesses were less methodical in their approach but came to the same conclusion: "South Carolina's population is approximately 30 percent black, and 30 percent of the senate should be black," argued Dr. Willie Gibson, president of the NAACP Conference for South Carolina. *Id.* at 252; *see also id.* at 253 (statement of Jesse Jackson).

Third, the Department of Justice has independently determined that the Act requires proportional representation. For example, a Justice Department memorandum on Barbour County, Alabama, candidly argued that "[s]ince blacks constitute 40.5 percent of the voting age population, they would be entitled to 2.8 districts, that is two viable districts plus a third district in which their interests must be taken into account even though they cannot control the election."

Thernstrom at 171-72, *see also id.* at 179. The DOJ has pursued an aggressive campaign to bludgeon state governments into compliance with its interpretation of the Act. This Court held in *Johnson II*, 115 S. Ct. at 2484, that the plan adopted by the Georgia state legislature "bore all the signs of [the Justice Department's] involvement," gouging out black populations and connecting them "by the narrowest of land bridges." (Internal citations omitted). The Justice Department demanded race-based revisions to Georgia's redistricting plans, and the state legislature eventually acquiesced. *Id.* In response, however, this Court affirmed the District Court's invalidation of the plan, concluding that "the Justice Department's implicit command [was] that States engage in presumptively unconstitutional race-based districting." *Id.* at 2493. Despite this firm rejection of the DOJ's position, the DOJ returns in this very same case to again advocate its vision of proportional representation.

It is no wonder that, prior to the very recent holdings of this Court, states seeking to avoid harassment and threats from the Department of Justice gerrymandered electoral districts according to race. *See generally Shaw v. Hunt*, 1996 WL 315870, *Bush v. Vera*, 1996 WL 315857, and *Johnson II*, 115 S. Ct. 2475 (each case striking down racially gerrymandered congressional districts). Justice Kennedy, concurring in *Johnson v. De Grandy*, 512 U.S.__, 114 S. Ct. 2647, 2666 (1994) (Kennedy, J., concurring in part and concurring in the judgment), correctly foresaw the results of the DOJ's interpretation of the Act:

> States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid § 2 [of the Act] litigation. Likewise, a court finding a § 2 violation might believe that the only appropriate remedy is to order the offending State to engage in race-based redistricting and create a minimum number of districts in which minorities constitute a voting majority. The Department of Justice might require (in effect) the same as a condition of granting preclearance, under § 5 of the Act, ... to a State's proposed legislative redistricting.

Johnson v. De Grandy, 512 S. Ct. at 2666.

The interpretation of the Act, by the Department of Justice and other appellants herein, is that redistricting must create racial proportionality.

This interpretation unconstitutionally requires the creation of racially proportional legislative districts. Originally, the intent of the Act was to ensure nondiscriminatory access to the ballot, *i.e.*, prohibiting literacy tests and other discriminatory prerequisites for voting. *See Allen v. State Board of Elections*, 393 U.S. at 582-94 (Harlan, J., dissenting). As such, it was a valid exercise of the Fifteenth Amendment's remedial powers and was "constitutionally valid as interpreted and as applied." *Shaw*, 509 U.S. at 654. But "Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must "'consist with the letter and spirit of the constitution.'" *Miller*, 115 S. Ct. at 2493 (internal citation omitted). The Voting Rights Act is not an all-purpose weapon to be used by social engineers in the pursuit of their concept of utopia. *See Presley v. Etowah County Commission*, 502 U.S. 491, 509 (1992); *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).

C. Recent Judicial Decisions Forbidding Reliance on generalized Societal Ills to Justify Racial Classifications Apply in Equal Force to Congressional Districting

There is no legal justification for racial segregation in redistricting, *i.e.*, there is no compelling state interest that

would allow this type of racial classification to survive strict scrutiny. *Shaw* and *Miller* settled the doctrinal issue that the race discrimination paradigm applies in the voting area as it does in every other area of our collective life. The modern paradigm originated in *Brown v. Board of Education*, 347 U.S. 483 (1954), which was decided as an education case. It was subsequently applied to all public facilities, but this Court did not write an opinion to explain why. The holding in *Brown* extended to public beaches, public golf courses, and every public facility.[2] But this Court decided the post-*Brown* decisions on a per curiam basis, leaving the rationale unarticulated.

The basic principle reinforced in *Shaw* and *Miller* is that *Brown* applies not only to very important things like education, but also to the use of bathrooms and water fountains. It is not the nature of the benefit or the subject matter that controls. The nature of the classification, namely race, is key. If race is used by government, strict scrutiny applies. Blumstein, *Shaw v. Reno and Miller v. Johnson: Where We Are and Where We Are Headed*, 26 CUMB. L. REV. 503, 503-04 (1995). The only possible remedy when a governmental entity racially gerrymanders is to replace it with a race-neutral districting scheme. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 186 (Burger, C.J., dissenting) (internal citation omitted).

Only one governmental interest can justify racial classifications under strict scrutiny: remedying the present

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[2] *See, e.g., Gayle v. Browder*, 352 U.S. 903 (1956), *rehearing denied*, 352 U.S. 950 (transportation); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches); *Muir v. Louisville Park Theatrical Assoc.*, 347 U.S. 971 (1954) (parks).

effects of identified past illegal discrimination by a particular government entity. *See Adarand v. Pena*, 115 S. Ct. at 2113; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524 (1989) (Scalia, J., concurring in the judgment); *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting); *Hopwood v. State of Texas*, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 116 S. Ct. 2579 (1996). This "remedy rationale" might be appropriate in the context of governmental hiring and contracting: A minority *individual* may have been denied the opportunity to compete for government employment or contracts because of his or her race and, by giving that *individual* a preference in the hiring/contracting process, an employer compensates that *individual* for a past opportunity denied.

This rationale, however, cannot square with the conditions of voting and redistricting. There are no residual losses from "bad" elections and redistricting schemes of the past: By properly redistricting, a governmental entity (or court) cleans the slate. The fact that a previous group of legislators invidiously gerrymandered by race after a previous census has absolutely nothing to do with the present redistricting process--either the new plan is race-neutral and must be deferred to, or it segregates individuals by race and must be struck down as unconstitutional. There simply is no grey area in redistricting. By creating "majority-minority districts," or "minority influence districts," or any other form of "racial borough," "[n]o old injustice is undone, but a new injustice is inflicted." R. Bork, *The Tempting of America* 106 (The Free Press, 1990); *see also* T. Sowell, CIVIL RIGHTS: RHETORIC OR REALITY 119 (1984). The court below properly recognized that the only constitutional response to racial gerrymandering is to replace it with race-neutral redistricting. If, however, this Court should hold that the appellants are correct that the Voting Rights Act requires proportional representation, then the Act violates all the

tenets of equal protection set forth above. The only recourse, if this Court cannot interpret the Act in any other way than appellants advocate, is to strike down the Act itself as unconstitutional.

II

REQUIRED RACIAL PROPORTIONALITY IS FUNDAMENTALLY OPPOSED TO AMERICAN PRINCIPLES OF GOVERNMENT

A construction of the Voting Rights Act which requires racial proportionality in redistricting is fundamentally opposed to American principles of government. It is no different than the strict quota systems in governmental hiring and contracting. *See, e.g., Northeastern Florida Contractors v. City of Jacksonville,* 508 U.S. 656, 662 (1993) (a strict quota system under a different label is still a quota system); *Regents of University of California v. Bakke,* 438 U.S. 265, 288-89 (1978) (same). Under a strict racial quota theory, the number of representatives from a particular racial heritage should mirror the percentage of the population with the same heritage. Strict racial quotas, however, have been found by this Court to be abhorrent to the Constitution. *See City of Richmond v. J.A. Croson Co.,* 488 U.S. at 499-508; *Bakke,* 438 U.S. at 307-11, 315-19 (opinion of Justice Powell); *Adarand v. Pena,* 115 S. Ct. at 2113. In its effects, however, the racial quota epitomized in proportional redistricting is even more invidious and destructive of American democracy than strict employment and contracting quotas: "Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards." *Wright v. Rockefeller,* 376 U.S. 52, 62 (1964) (Douglas, J., dissenting).

There are five reasons why racial gerrymandering to achieve racial proportionality violates American principles of government. First, dividing voters by race divides

communities and places undue emphasis on defining the parameters of the characteristic of division. Second, racial gerrymanders encourage the representatives elected from those districts to respond only to the concerns of the racial group which elected them, to the detriment of the "filler" voters in the district. Third, corralling members of a particular racial group into a limited number of districts prevents those individuals from exerting any influence in the districts from which they have been excluded. Fourth, racial gerrymandering and racial proportionality are based on the assumptions and stereotypes that race is the single most important factor in determining a person's political philosophy or voting priorities. Fifth, our Nation has a long history of determining the composition of representative bodies on the basis of geography. To permit a single interest group, if indeed a racial group can be so designated, a proportional designation of seats in a legislature, exalts race over every other interest group which is constrained in its influence by the geographical boundaries in which it is located. Each of these reasons is discussed in turn below.

A. Districting By Race Divides Communities

First, racially proportional redistricting "is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense." *Wright,* 376 U.S. at 66 (Douglas, J., dissenting).

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than political issues are generated; communities seek not the best representative but the best racial or religious partisan. ... [T]hat system is at war with the democratic ideal."

Id. at 67. "Racially defined wards" accentuating "race-based allegiances and divisions," obviate the need to form coalitions and seek compromise--two of the most heralded features of American government. Senate Hearings at 1449 (statement of Professor William Van Alstyne). "Safe minority districts," like the white gerrymandered districts of the past, obstruct voters or candidates from building bridges between racial groups and from forming voting coalitions that transcend skin color. *Holder,* 114 S. Ct. at 2599 (Thomas, J., concurring). "[D]emocratic choice and democratic institutions require a fluidity and freedom that are at odds with the concept of labeling citizens for political purposes on the basis of race or ethnicity." Thernstrom at 124. The Voting Rights Act, "a statute meant to hasten the waning of racism in American politics," *De Grandy,* 114 S. Ct. at 2661, thus becomes a tool of division rather than integration.

There is the corollary problem created when government tries to determine who fits into various categories. Already, there have been heated debates over the definition of census categories. For example, should the children of black and white unions be designated separately or subsumed under the category of African-American? Is "Hispanic" a coherent category or should national subgroups be separately identified? Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 901 (1995), citing Epstein, *Note: Who's Black, Who's White, and Who Cares: Reconceptualizing the United States' Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 535-61 (1995) (describing pressure that civil rights enforcement has placed on the Equal Employment Opportunity Commission and courts to define racial categories). The act of assigning representation on the basis of what state authorities determine to be the defining feature of a citizen's existence is necessarily problematic. *Id.* at 903. By refusing to categorize individuals on the basis of immutable and

irrelevant characteristics, the government (and the court below) avoids this thorny issue entirely.

B. Districting By Race Encourages Representatives to Respond to Those of the Same Race While Dismissing Concerns of Electors of a Difference Race

Second, a necessary corollary of this racial divisiveness is ambivalence by white politicians toward minority citizens and minority politicians toward white citizens. It is "unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens." *United States v. Dallas County Commission,* 850 F.2d 1433, 1444 (11th Cir.) (Hill, J., concurring), *cert. denied* 490 U.S. 1030 (1989). "[A]ssured minority representation encourages local white politicians to say to the minority communities: 'You have your own representatives. Don't come to us with your problems; speak to them.'" Senate Hearings at 1327-28 (testimony of Professor Horowitz). Race relations suffer when electoral remedies favor one minority group or create environments in which candidates can engage in racially or ethnically polarizing tactics without fear of defeat. This is true whether one is discussing former Klansman David Duke, whose racist statements garnered him 55% of the white vote in his 1991 gubernatorial race in Louisiana, or Chicago's Gus Savage, whose rampant anti-Semitism apparently cost him few black votes. Swain at 295.

The right to vote should have a single meaning--one that recognizes the values the right protects and the functions it serves in a democratic society. That value comes not from proportional representation. Rather, it comes from the ability to join together with others to make one's numbers felt in the political process and, therefore, in societal decision-making. It comes from being able to form alliances

to further common goals. In short, it comes from being able to participate in the "pluralist bazaar of politics." Butler, *Denial or Abridgment of the Right to Vote: What Does It Mean?*, in L. Foster, ed., THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS at 57 (1985).

C. Districting By Race Assumes that Minorities Would Rather Have Overwhelming Control of One District Than Influence Over Several Districts

Third, a state-imposed racial gerrymander assumes that, given a choice, black voters would not choose to exercise broader influence over a number of competitive districts. One of the obvious effects of creating and maintaining safe black seats is to isolate the black community, as well as to diminish electoral competition. Where black voters are confined to a single constituency, they might well be certain of electing *one* black candidate, but the elected representative might also be the only one--or a member of a small, heavily outnumbered and, consequently, ineffective band. Meanwhile, the black electorate suffers a diminished capacity to influence white representatives who might have taken their concerns into account if they themselves had needed to rely on black votes. J. R. Pole, *The Pursuit of Equality in American History* 449-50 (2d ed. revised, University of California Press, Berkeley, 1993) (Pole); D. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 96 (Basic Books, Inc., N.Y., 1987).

"'I am bitterly opposed to any effort to resegregate me ...,' a black judge in Norfolk, Virginia, testified at a voting rights trial. 'How does it help the black community to limit itself to two predominantly black wards and be of no consequence in the remainder of the community? Political power is not merely symbolic.'" Thernstrom at 244. Without the divisive force of racial reapportionment, politicians are forced to weld together multiracial coalitions. Democrats and Republicans, of all races, regularly owe their

election to minority support. Even separatists of the past, such as Dixiecrat politicians Strom Thurmond and George Wallace, have sought minority support out of political necessity and thus have been forced to address the concerns of *all* constituents, regardless of race. *Id.* at 234, 241. Such coalitions exemplify the American political tradition.

D. Districting By Race Assumes that Race Is the Crucial Factor to Determine Individuals' Political Philosophy and Voting Priorities

Finally, and most importantly, racial redistricting makes the patently false and pernicious assumption that all minorities think alike and that only a member of a given minority can properly represent minority interests. Racial gerrymandering causes injury based on the classification itself. The precise injury suffered by those on whom racial gerrymandering falls is not vote dilution, but rather the subjection to race-based decision-making. For white voters the injury is being stigmatized by the assumption that they are so prejudiced that black voters need government protection from them. White voters are injured by the assumption that one's black neighbors have a greater community of representational interests with black voters hundreds of miles away than they have with the people in the community where they live and work. For black voters, the injury is being subjected to the assumption that skin color primarily defines representational interests. Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights (Affirmative Racial Gerrymandering)*, 26 RUTGERS L.J. 595, 610 (1995).

This Court has held that racial gerrymandering "reinforces the perception that members of the same racial group--regardless of their age, education, economic status, or the community in which they live--think alike, share the

same political interests, and will prefer the same candidates at the polls." *Shaw*, 509 U.S. 630, 647 (1996). In fact, "[b]y perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Id.*

Recently, Justice Thomas reiterated and expanded on these sentiments: "The clear premise of the system is that geographic districts are merely a device to be manipulated to establish 'black representatives' whose real constituencies are defined, not in terms of the voters who populate their districts, but in terms of race. The 'black representative's' function, in other words, is to represent the 'black interest.'" *Holder*, 114 S. Ct. at 2599 (Thomas, J., concurring).

Race cannot be used as a proxy. It may be, as an empirical matter, that in a certain political situation "black" Democrats are a good proxy for "loyal" Democrats, but that type of racial proxy will not be acceptable. Democrats, black and white, can be districted into an incumbent's district to solidify a base of support, but race cannot be used as a proxy for loyalty, or disloyalty, to a particular party. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("Race cannot be a proxy.... We may not accept as a defense to racial discrimination the very stereotype the law condemns"). This is the kind of stereotypical approach and attitude that the Court has condemned in all the racial gerrymander cases. Blumstein, *Shaw v. Reno and Miller v. Johnson: Where We Are and Where We Are Headed*, 26 CUMB. L. REV. at 512-13 (1995).

Appellants make the faulty assumption that all white voters are fungible. Thus, if majority white districts are a greater percentage of all districts than whites are of the electorate, whites are "over represented" and minorities are "under represented." To appellants, all districts that are majority white are created for whites, thereby, "fairness"

dictates that some districts be created for blacks. Even if it is accurate to characterize blacks and other minorities as groups who see their political interest as tied to the election of candidates from within the group, it is inappropriate to view "whites" as the political group with which minorities compete for political influence in the districting process. White voters are not a monolithic group whose primary political goal is to elect white officials. White voters are splintered in many competing political factions designated either by party (*e.g.*, Republican, Democrat, Libertarian, Reform) or by concentration on a single issue (*e.g.*, environmentalists, right-to-lifers). Moreover, districts are seldom created "for" white voters. Most districts contain a majority of white voters because whites are a majority of the population. Inevitably, when districts are geographically compact and respect political boundaries, most will be majority white. Indeed, if there were more "naturally occurring" majority-minority districts, legislators would not have resorted to drawing bizarre ones. Butler, *Affirmative Racial Gerrymandering* 26 RUTGERS L.J. at 617-18. Blacks are not likely to become a numerical majority in America anytime soon. If, however, race ceases to be a basis for minority treatment, if African ancestry brings no greater benefits or burdens than European ancestry, the numbers of blacks or other minorities in particular fields becomes irrelevant. While we cannot effectively mandate that individuals look beyond race, we increase the chances that race will matter less if we, as a government, steadfastly reject measures that affect individuals, positively or negatively, based on their membership in an immutable group. *Affirmative Racial Gerrymandering*, 26 RUTGERS L.J. at 599.

E. Geography Is the Long Standing Neutral Principle of American Congressional Districts

The Founding Fathers valued the faction-diluting character of representation by place. Rather than representation by wealth, by profession, or any other principle of organization which would define in advance the kinds of interests that would be admitted to the game of politics, the authors of the Constitution deliberately chose geographical representation. They believed this principle possessed a randomizing effect on the make-up of the voting public. Polsby and Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. AND POL. REV. 301, 307 n.29 (1991) (*Third Criterion)*. Thus, for example, when Alexander Hamilton argued in the Federalist Papers that the "wealthy and the well-born"--a faction--would not come to dominate the legislature through abuse of the voting process, he asked:

> Are the wealthy and the well-born, as they are called, confined to particular spots in the several States? Have they, by some miraculous instinct of foresight, set apart in each of them a common place of residence? Are they only to be met with in the towns or cities? Or are they, on the contrary, scattered over the face of the country as avarice or chance may have happened to cast their own lot or that of their predecessors?

The Federalist No. 60 at 370-71 (A. Hamilton) (Rossiter, ed. 1961). A gerrymander defeats this randomizing effect by picking and choosing the factions which will exist within particular boundaries.

Thus, geography is the basis upon which representation is assigned. In many other democracies, seats are assigned to competing political parties on the basis of their share of

the vote. *See generally*, P. Norton, THE BRITISH POLITY 99-101 (1984) (describing various types of proportional representation in the United Kingdom, West Germany, and Italy). In these proportional representation systems, groups with limited political agendas may be directly represented in the legislative body by a party organized specifically to further the groups' purposes. *Id.* In the United States, however, all groups must further their political interests within the confines of a representational system based on geographically constructed, winner-take-all, districts. Therefore, environmentally oriented voters will be represented in the legislative body by the representatives elected from their geographically based districts--representatives for whom the environment will be but a single item on their legislative agenda. Similarly, Democrats who deliver 49% of a district's vote for the Democratic nominee will nevertheless be represented by the Republican who received 51% of the vote. Gerrymandered, race-based districts are an attempt to provide direct interest group representation to minorities. To recognize minorities as a community of interest within the confines of geographically based districts affords minorities the same treatment as other geographically concentrated interest groups with sufficient political clout to demand a district. However, the creation of minority districts by extreme gerrymandering frees minorities, and only minorities, from the constraints that a geographically based representational scheme places on other interest groups. *Affirmative Racial Gerrymandering* 26 RUTGERS L.J. at 620-21.

CONCLUSION

The national habit of counting by race is more difficult to eradicate than it was to instill. It is easier to confer an entitlement, or to inspire a claim to one, than to withdraw it.

Yet, this Court, in its Voting Rights Act decisions of the past few years, has sought to deflect the otherwise irreversible tendency toward the convenient and destructive practice of allocating resources, including representation in our national legislature, by racial groups. As this Court noted in *Bush v. Vera*, 1996 WL at *20, legislatures and district courts nationwide have reembraced the traditional districting practices that were almost universally followed before the 1990 census in response to the *Shaw v. Reno* decision. Those practices and Supreme Court jurisprudence acknowledge voters as more than mere racial statistics which play an important role in defining the political identity of the American voter. *Id.* The court below followed the dictates of this Court that racial gerrymandering is unconstitutional. The District Court's drawing of Georgia's congressional District Lines adheres to the traditional districting principles endorsed by this Court and should be affirmed.

DATED: August, 1996.

Respectfully submitted,

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